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**THE HUMAN RIGHTS IMPLICATIONS OF THE 'BEST LOSER SYSTEM' IN MAURITIUS AND  
PROSPECT OF REFORM**

**SUBMITTED TO THE FACULTY OF LAW OF THE UNIVERSITY OF PRETORIA, IN PARTIAL  
FULFILMENT OF THE REQUIREMENTS FOR THE MASTERS OF LAW (LLM IN HUMAN  
RIGHTS AND DEMOCRATISATION IN AFRICA)**

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**DECLARATION**

I, KRISHNA SHAM SEEOBIN, declare that the dissertation THE HUMAN RIGHTS IMPLICATIONS OF THE 'BEST LOSER SYSTEM' IN MAURITIUS AND PROSPECT FOR REFORM is my work and that it has not been submitted for any degree or examination in any other university.

All the sources used or quoted have been duly acknowledged. The clip-art on the cover is a design from the clip-art collection of Microsoft Word 2003 under the theme 'law' (the colour has been changed to black).

The word count is 17,997 (excluding table of contents, table of abbreviations and bibliography but including footnotes).

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**Date :**

## **DEDICATIONS**

**To my family,**

**The Mauritian and African society, which I love.**

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My next round of thanks will go to my family which is and will undeniably remain the pillar of my strength. At present time whilst I am on the African continent, my father,

Mr Samnanan Seegobin is on a project management venture on the island of Rodrigues; my mother, Mrs Karunah Seegobin, is in Mauritius and my brother, Dr Shiv Seegobin, is attending to his patients in Melbourne, Australia. Despite being separated at different places in the southern hemisphere in this year of 2009, we have looked after one another and preserved the family spirit which, at end of term, has been consolidated.

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I heartily thank all the above and wish them peace.

## **TABLE OF ABBREVIATIONS**

<b>ACHPR</b>	<b>African Charter on Human and Peoples' Rights</b>
<b>AV</b>	<b>Alternative Vote</b>
<b>BLS</b>	<b>Best Loser System</b>
<b>CERD</b>	<b>Committee on Elimination of Racial Discrimination</b>
<b>CLPR</b>	<b>Closed List Proportional Representation</b>
<b>CSCE</b>	<b>Conference on the Security and Cooperation in Europe</b>
<b>EIU</b>	<b>Economist Intelligence Unit</b>
<b>EISA</b>	<b>Electoral Institute of Southern Africa</b>
<b>EOA</b>	<b>Equal Opportunities Act</b>
<b>FPTP</b>	<b>First Past The Post</b>
<b>ICCPR</b>	<b>International Covenant on Civil and Political Rights</b>
<b>MMC</b>	<b>Multi-Member Constituency</b>
<b>MLP</b>	<b>Mauritius Labour Party</b>
<b>MMM</b>	<b>Mouvement Militant Mauricien</b>
<b>MSM</b>	<b>Mouvement Socialiste Mauricien</b>
<b>PMSD</b>	<b>Parti Mauricien Socialiste Democrate</b>
<b>PR</b>	<b>Proportional Representation</b>
<b>MR</b>	<b>Mauritius Reports</b>
<b>SCJ</b>	<b>Supreme Court Judgment</b>
<b>STV</b>	<b>Single Transferable Vote</b>
<b>TVFT</b>	<b>Three Vote For Three</b>
<b>UN</b>	<b>United Nations</b>
<b>UNHRC</b>	<b>United Nations Human Rights Committee</b>



## **1. Introduction**

### **1.1 Background to the problem**

The Best Loser System (BLS) in Mauritius is a component of the electoral system where candidates are selected by established procedure on the basis of their race or community to stand as members of parliament,<sup>1</sup> as a tool to protect minority interests. Debates about the legitimacy of the BLS as a tool for nominating parliamentarians have raged since its conception in the pre-independence period to present day<sup>2</sup> whilst the government of Mauritius has now and then exhibited an impetus to change the whole electoral system to a system endorsing better representation of the electorate.<sup>3</sup> With other unexpected government priorities flaring up,<sup>4</sup> the electoral reform has been secluded back to the drawer and the BLS has remained entrenched as part and parcel of the electoral system, unaltered and determined to stay with persistent inveteracy as a shibboleth. Fathoming the human right merits of the BLS has first to be preceded with an overview of the electoral system in Mauritius together with the ethnic peculiarities which permeate in society. Altogether, the present thesis will isolate the human rights implications of the BLS and find a possible alternative which will compromise between the different schools of thoughts, as well as accord with democratic principles which the Republic of Mauritius has always hoisted.<sup>5</sup>

### **1.2 The electoral system in Mauritius**

The electoral system in Mauritius is a two-tiered electoral scheme consisting of firstly a First-Past-The-Post (FPTP) , Three-Vote-For-Three (TVFT) system and secondly the BLS. The

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<sup>1</sup> Constitution of the Republic of Mauritius 1968, First Schedule, Sec 5(1).

<sup>2</sup> S Ryan 'Government and opposition- roles, rights and responsibilities: reforming electoral systems' (2005) 9; Electoral Institute of Southern Africa (EISA) 'Country report based on research and dialogue with political parties' (2005) 12. The authors assert that in many ways the BLS perpetuates communalism.

<sup>3</sup> 'Cassam Uteem boosts electoral reform' *L'Express* (25 April 2008) available at <<http://allafrica.com/stories/200804250562.html>> (accessed 16 July 2009).

<sup>4</sup> The food crisis is for instance one government priority at this point which can mitigate the impetus of government to address issues such as electoral reform; 'Mauritius: Resolving the food crisis' *L'Express* (23 July 2008) available at <<http://allafrica.com/stories/200807230728.html>> (accessed 16 July 2009); Rama Sithanen 'Riding out the Global Crisis: Saving jobs, protecting people, preparing for recovery' (2009) 4 para 16 available at <<http://www.gov.mu/portal/goc/mof/files/budspeech09.pdf>> (accessed 16 July 2009). The Appropriation Bill (budget) lists the shocks that affected the economy in 2008 namely food crisis, oil crisis, global food crunch, cut in the price of sugar, sub-prime crisis and the slumping world economy and does not make mention of any budget for the electoral reform.

<sup>5</sup> The Economist Intelligence Unit 'The Economist Intelligence Unit's Index of Democracy 2008' (2009) 4 available at <<http://graphics.eiu.com/PDF/Democracy%20Index%202008.pdf>> (accessed 23 September 2009) ; According to the index based on five criteria to evaluate the level of democracy, Mauritius is the only 'full democracy' in Africa, the other African countries being qualified as 'flawed democracies', 'hybrid regimes' and 'authoritarian regimes'.

parliament of Mauritius (the National Assembly) houses 70 elected parliamentarians, 62 of which are elected through the FPTP system.<sup>6</sup> The 62 parliamentarians are returned from 20 three-member constituencies on the mainland of Mauritius (thus adding to 60) and two are returned from the island of Rodrigues. Each voter in the FPTP elects three candidates by crossing three boxes next to the candidates' names on the ballot paper. The success of the candidates depends on the simple arithmetic summation of all the votes won. The three candidates winning the highest number of votes become the elected candidates for that constituency.

### 1.3 The Best Loser System

The remaining eight parliamentarians are nominated by the Electoral Supervisory Commission, an independent body established under the Constitution,<sup>7</sup> through the BLS and they are thus called 'Best Losers'. This process occurs after the 62 parliamentarians have been elected through the FPTP. The 'Best Losers' enjoy the same rights and privileges as any other duly elected parliamentarian through the FPTP.<sup>8</sup>

There are two sets of four 'Best Losers': the first four are selected according to their race and suffrage; the second four are selected according to their race, suffrage and political party.<sup>9</sup> Four races or communities are identified in the Constitution for purposes of the BLS.<sup>10</sup> These are Hindus, Muslims, the General Population (consisting mainly of people of African descent)<sup>11</sup> and Sino-Mauritians (people originating from China). The mechanism through which the 'Best Losers' are selected is explained in the following paragraph:

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<sup>6</sup> n 1 above, First Schedule, Sec 1(1).

<sup>7</sup> n 1 above, Sec 41.

<sup>8</sup> Mr Sinatambou, a 'Best Loser' in the 2005 general elections in constituency 16, assumed the position of Minister of Information and Communication Technologies until 2008. Mr Chaumière, 'Best Loser' in the same general elections in constituency 15 assumed the position of Minister of Labour relations in 2008. Positions held by the aforementioned persons while they hold 'Best Loser' seats can be inferred from 'Etienne Sinatambou, désigné deputy speaker' *L'Express* (19 September 2008) available at <<http://fr.allafrica.com/stories/200809190606.html>> (accessed 23 September 2009); Electoral Commissioner's Office 'The National Assembly Elections held on 3 July 2005' available at <[http://www.gov.mu/portal/site/eco/menuitem.37ba32a3c4783128d6c8662948a521ca/?content\\_id=c32b9dbfa1158010VgnVCM100000ca6a12acRCRD](http://www.gov.mu/portal/site/eco/menuitem.37ba32a3c4783128d6c8662948a521ca/?content_id=c32b9dbfa1158010VgnVCM100000ca6a12acRCRD)> (accessed 23 September 2009).

<sup>9</sup> n 1 above, First Schedule, Sec 5(4).

<sup>10</sup> n 1 above, First Schedule, Sec 3(4).

<sup>11</sup> According to the information given by the delegation of Mauritius to the Committee on the Elimination of Racial Discrimination (CERD), 'General Population' referred to people of French, African and mixed descent and possibly devised as a designation of all Christians, of whatever origin or race, CERD 'Summary record of the 1174th meeting' (1996) CERD/C/SR1174 para 3 available at <<http://www.unhcr.ch/tbs/doc.nsf/7cec89369c43a6dfc1256a2a0027ba2a/f7db171b5d85b0f5802565290055f0bd?OpenDocument>> (accessed 23 September 2009).

### 1.3.1 The first set of four 'Best Losers'

The following steps are carried out sequentially to determine the first set of four Best Losers:

- a. The total number of persons in a community as determined by the 1972 ethnic census is divided by the number of seats won by that community, plus one.<sup>12</sup> For instance, if the General Population has won seven seats out of 60, irrespective of which political party they belong to,<sup>13</sup> then the number of citizens pertaining to that community is divided by (7+1). This calculation is repeated for all the four communities.
- b. The community which gives the highest quotient (that is the greatest magnitude of the result following the calculation) is the most under-represented community. Hence, it should benefit from the first 'Best Loser' seat.
- c. The next question which arises is to whom, that is to which unsuccessful candidate specifically, should the 'Best Loser' seat be allocated. The percentages of votes of all the candidates from that community are calculated in relation to their respective constituencies. The candidate having scored the highest percentage of votes benefits from the seat. For example, if candidate X in constituency 5 has won 12% of the constituency votes and candidate Y from constituency 6 has won 11% of his constituency votes, candidate X will win the seat.
- d. The above steps are repeated for determining the second, third and fourth 'Best Loser' seat.<sup>14</sup>

### 1.3.2 The second set of four 'Best Losers'

The second set of four 'Best Losers' are allocated based on race or community, suffrage as well as political party.<sup>15</sup> The basic idea behind having a second set of 'Best Losers' is that the expression of democracy which underlies the election of the 62 parliamentarians should not be tampered with. In other words, the government is deemed to be constituted through the outcomes of the FPTP. The BLS cannot be used as a mechanism to overthrow an already constituted government although minorities are given a chance to be represented. Thus, the second set of Best Losers compensates to the political party or party alliance in government the

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<sup>12</sup> The number one is added as the sum would represent the number of seats which the community would possess *should* the 'Best Loser' seat be allocated.

<sup>13</sup> n 1 above, First Schedule, Sec 5(3).

<sup>14</sup> The number of seats for each community are accordingly increased in the calculation should the community have already benefited from a 'Best Loser' seat.

<sup>15</sup> n 1 above, First Schedule, Sec 5(4).

number of seats which that party or alliance has not secured in the first set of 'Best Losers'. For instance, if in the first set of 'Best Losers', the party or alliance due to take on government wins only one seat out of four, then the three seats which it has missed should be allocated back to the party or alliance from the second set of four Best Loser seats. Hence, the BLS will create no imbalance if ever the party or alliance has taken over government tightly, which might be the case in a 32-30 situation. The steps to allocate the second set of 'Best Losers' are thus as follows:

- a. The same calculation as in the first part is carried out, and the under-represented community likewise identified.
- b. The percentages of votes of candidates from the under-represented community are considered, but this time those from the ruling party or alliance are short-listed. The unsuccessful candidate from the ruling party who has the highest percentage of votes and who is from the right community earns the first seat.<sup>16</sup>
- c. The above procedure is repeated until all the missed ruling party or alliance seats are filled up.
- d. If there are still empty 'Best Loser' seats, for instance if the eight seat is vacant, the seat is allocated on the same community and suffrage requirements but to the second most successful party.<sup>17</sup>

#### **1.4 Statement of the problem**

Numerous criticisms can be leveled at the BLS from a human rights and democratization perspective. The following impediments will be elaborated at a latter part of the thesis, and a succinct mention of each of them suffices in this paragraph. Firstly, the BLS introduces elements of communalism in the Constitution which otherwise prohibits discrimination on the basis of race.<sup>18</sup> Secondly, candidates should disclose their race or community on the nomination paper for standing as a candidate to the general elections although the race or community will not be mentioned on the ballot form viewed by the voter. Non-disclosure of the community will lead to

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<sup>16</sup> The candidate selected in the second set of the 'Best Loser' seats on the basis of community and party may thus be further down the list than the ones in the first set and for all the 'Best Losers', gaps of unelected candidates may remain in between the selected candidates and the ones elected through the FPTP.

<sup>17</sup> n 1 above, Sec 5(6).

<sup>18</sup> n 1 above, Sec 3 & 16.

invalidation of the nomination.<sup>19</sup> Thirdly, while disclosure of the race or community might entitle a particular candidate to a 'Best Loser' seat, there is no safeguard to ensure that the candidate is disclosing the appropriate community.<sup>20</sup> In other words, it seems that nothing can stop a candidate who is apparently Muslim but who has registered as a candidate of the General Population from securing the 'Best Loser' seat which is due to that particular community. Fourthly, the population figures used for purposes of the BLS date from the ethnic census carried out by the government of Mauritius in 1972 when the population of Mauritius would sum up to around 800, 000 inhabitants.<sup>21</sup> Fifthly, results in individual cases while using the BLS have turned out to be irrational. In cases of 60-0, that is where all the 20 constituencies return 3 candidates all of one political party or party alliance, there would be no candidate eligible for the second set of 'Best Loser' seats.<sup>22</sup> Sixthly, the BLS is not based on direct participatory democracy, but rather on calculations which cannot be foreseen by the voter at the time of election. Nomination of a candidate as a 'Best Loser' depends on the overall percentage of votes which that candidate has won in his constituency against suffrage in other constituencies. Seventhly, it also impinges on democracy to the extent that the 'Best Losers' will represent the interest of the members of the same constituency where they have failed to get elected through the FPTP. There is always the danger that they might thus be unwanted representatives. Eighthly, but importantly, only a candidate who joins a political party is eligible for a 'Best Loser' seat.<sup>23</sup> Therefore, an independent candidate who belongs to a minority entitled to secure a 'Best Loser' seat cannot do so despite harvesting a suffrage entitling him to same. Ninthly, only four communities are isolated for purposes of the BLS whilst contemporary Mauritius might consist of more minorities, or at least groups which consider themselves as separate minorities.

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<sup>19</sup> National Assembly Election Regulations 1968, Sec 12(5), and as reiterated in *Electoral Supervisory Commission v the Honourable Attorney General* 2005 SCJ 252.

<sup>20</sup> *Parvez Carrimkhan v Tin How Lew Chin & Ors* 2000 SCJ 264.

<sup>21</sup> According to the Mauritius 1972 banned population census with community affiliation (the original results of which are unavailable), there were around 430,000 Hindus, 130,000 Muslims, 25,000 Sino-Mauritians and 250,000 members of the General Population. These figures thus roughly add to 835,000 inhabitants. However, according to more recent statistical reports, the population of Mauritius can be rounded off to the nearest thousandth to be 1,223,000, Central Statistics Office 'Mauritius in Figures' Ministry of Finance and Economic Development (2005) 8.

<sup>22</sup> In the 1995 general elections, there was a situation of 60-0 by the leading party or party alliance from the 20 mainland constituencies. In such a situation when the leading party wins all the seats, there is no possibility of compensating the party or party alliance in the second set of 'Best Loser' seats with their own unreturned candidate as they have none. In those years, there were just 66 parliamentarians in the National Assembly instead of 70, from 'A critical appraisal of the BLS' *L'Express* (5 June 2008) available at <<http://allafrica.com/stories/200806050952.html?page=3>> (accessed on 17 July 2009); H Mathur *Parliament in Mauritius* (1991) 290.

<sup>23</sup> This can be inferred from Sec 5(3) and Sec 5(4) of the First Schedule of the Constitution.

## 1.5 Research problems

The main overarching research question is the following : What are the human rights implications and the prospect of reform of the BLS?

Chapter 1 will thus embody this introduction. Chapter 2 will answer the question whether the BLS should be subsumed under another electoral system with a significant doze of PR. Chapter 3 will clarify the conundrum whether the BLS causes discrimination on the basis of race. Chapter 4 will determine to what extent the sanction for non-declaration of the community on the nomination paper for the purposes of the BLS impinges on human rights. Chapter 5 will consider whether the BLS infringes on negative freedom of association for an independent candidate wishing to secure a 'Best Loser' seat. Chapter 6 will determine to what extent the explicit mention of communities in the Constitution hampers democratization. Finally, Chapter 7 will end by recommending a proposed model in light of the findings in the thesis, after which will follow a conclusion.

## 1.6 Methodology

The methodology used will be desktop research.

## 1.7 Literature Review

Academics have since the 1990s criticized the discrimination issues which are spawned by the BLS.<sup>24</sup> The press has now and then re-ignited debates surrounding the BLS<sup>25</sup> as a means to draw the attention of the public to this issue. The government of MSM/MMM made a move for a general electoral reform in 2002 by appointing a commission on electoral reform, headed by Justice Albie Sachs, and known popularly as the Sachs Commission, to determine possible ways of electoral reform which could be implemented. The Commission produced a report embodying its findings<sup>26</sup> but these were mostly geared towards a general electoral reform relating to the FPTP rather than a specific look at the BLS. Still, the *en passant* analysis made by the Commission in relation to the BLS has convinced the Commission that the BLS should be

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<sup>24</sup> H Mathur *Parliament in Mauritius* (1991) 55.

<sup>25</sup> n 3 and n 22 above; 'The Best Loser System on the way out' *l'Express* (28 March 2008) available at <<http://allafrica.com/stories/200803280936.html>> (accessed on 17 July 2009), where the news reporter underlines that 'the fear that gave rise to it [the BLS] in the first place, is alive and will need to be eased off with another system ensuring adequate representation of minority communities.'

<sup>26</sup> Government of Mauritius 'Report of the Commission on Constitutional and Electoral Reform' (2002).

subsumed in the new dispensation,<sup>27</sup> on the assumption that the new dispensation is the FPTP with a dose of Proportional Representation (PR).<sup>28</sup> The Commission then mentioned as a way forward that the BLS should be subsumed following a process of 'negotiation and explanation' by parties which stand to lose by an eradication of the BLS.<sup>29</sup> The present thesis will go further by its substantive evaluation of the BLS against a background vested by human rights and democratic principles, and by presenting prospect of reform to the BLS itself. While the Sachs Commission has held for a doze of PR to absorb the BLS, certain political party leaders opine that the BLS, despite being criticized by some, has been able to give minority communities an adequate representation at the National Assembly.<sup>30</sup> Other views after the deliberation of the Sachs Commission tend to suggest that the FPTP should<sup>31</sup> and will be kept.<sup>32</sup>

In early 2009, the democracy index of the *The Economist Intelligence Unit* (EIU) portrayed Mauritius as a 'full democracy' and ranked it twenty-seventh on a list of 167 countries, just after France and Portugal.<sup>33</sup> According to the methodology used to determine the degree of democracy, the pitfall which prevented Mauritius to be higher up in the ladder was 'political participation' determined in part by whether ethnic, religious and other minorities have a reasonable degree of autonomy and voice in the political process.<sup>34</sup> There can be no other reason than the present electoral system with the lack of effectiveness of the BLS to explain the average rating allocated to Mauritius with regards to 'political participation'.

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<sup>27</sup> As above, para 62.

<sup>28</sup> n 26 above, para 51(ii). The Commission has recommended for the 62 FPTP seats to be retained and for 30 additional seats to be introduced under the PR system.

<sup>29</sup> n 26 above, para 69.

<sup>30</sup> E Francois 'Une Analyse des Votes Créoles' available at <[http://www.globalmauritian.com/article\\_view.php?id=125](http://www.globalmauritian.com/article_view.php?id=125)> (accessed 6 August 2009), the author also quotes the leader of the MMM who orated that if necessary 'the BLS should be maintained', 'particularly for the Muslim and Sino-Mauritians'. The leader of the MSM also voiced out that he will lobby for the preservation of the BLS as it has been a system which has assured the representation of different communities in the National Assembly, 'Le Best Loser System: Un pays prisonnier d'un système sectaire' *L'Express* (6 April 2007) available at <[http://www.lexpress.mu/Services/archive\\_83906\\_LE--BEST-LOSER-SYSTEM->](http://www.lexpress.mu/Services/archive_83906_LE--BEST-LOSER-SYSTEM->)> (accessed on 29 August 2009).

<sup>31</sup> 'Points to Ponder: Down with PR' *Mauritius Times* (4 April 2008) available at <<http://www.mauritiustimes.com/040408lex.htm>> (accessed 10 August 2009).

<sup>32</sup> L Charalambous 'Consultation on Electoral Reform To Start In May, Mauritian PM Reveals' (2008) available at <[http://www.tax-news.com/asp/story/story\\_print.asp?storyname=30494](http://www.tax-news.com/asp/story/story_print.asp?storyname=30494)> (accessed 6 August 2009). The article reports that the Prime Minister has given assurances that the government will not change the FPTP system.

<sup>33</sup> n 5 above.

<sup>34</sup> n 5 above, p 10.

## Chapter 2: Consumption of the BLS under another electoral system

Since the Sachs Commission has already given the indicative canvas that the BLS should be subsumed and for purposes of clarity and stepwise analysis of the thesis, it is necessary to situate the fate of the BLS in the Mauritian electoral system before proceeding any further.

### 2.1 Effect of PR on community representation

International NGOs working exclusively on minority rights have observed that some electoral arrangements such as block votes, closed or open list PR, and transferable votes will not guarantee minority representation but under certain circumstances may promote it.<sup>35</sup> Such a proposition is very true, especially in the case of Mauritius. PR will reinforce minority protection especially if political parties were formed on ethnic lines. Such is not the case as most political parties contain a healthy blend of the different communities.<sup>36</sup> In a PR system, the ranking of candidates would be declared public if the list is open, or unknown until election results are announced if the list is closed.<sup>37</sup> However, it has always been the practice in Mauritius that the rank of candidates in a political party has been irrespective of the community of the candidate.<sup>38</sup> The rankings of candidates belonging to particular communities are likely to be haphazard in proportional closed or open lists as it is clearly unconceivable to believe that out of 60 candidates proposed by a major political party in Mauritius, the first 30 will be Hindus given that Hindus around 50% of the population and that only then would the next 18 be members of the General Population. Rather the different communities will be distributed throughout the list based on criteria which are set by the political party itself. It is thus impossible for the voter belonging to a minority community to know for sure whether his candidate down the list will be elected especially if the elections are tight. PR in Mauritius will then pose a very serious threat:

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<sup>35</sup> C Baldwin & Ors 'Minority Rights: The Key to Conflict' (2007) 13.

<sup>36</sup> n 26 above, para 65. The Sachs Commission notes that an advantage of the bloc-of-three system is that no community is left out in the allocation of tickets. Furthermore, membership criteria in political parties are non-discriminatory according to the research made through the EISA in S Bunwaree & R Kasenally 'Mauritius: Country Report based on Research and Dialogue with Political Parties' (2005) 8.

<sup>37</sup> In nationwide Closed List Proportional Representation (CLPR), the party leaders rank candidates and voters only select political parties while in Open List Proportional Representation (OLPR) voters can cast their votes for a particular candidate on the party list, as succinctly put by Kunicova and Rose-Ackermann while they argue that CLPR systems in large districts causes political corruption as it is more difficult to monitor politicians' malfeasance and oust them out of office if needed, J Kunicova & S Rose-Ackerman 'Electoral rules as constraints on corruption: the risks of closed-list proportional representation' (2001) 2,5 available at <<http://www.yale.edu/leitner/resources/docs/2001-14.pdf>> (accessed on 24 August 2009).

<sup>38</sup> It can easily be argued that party loyalty for instance plays a role in determining the rank of a politician in the political party. Authors have pointed out that party members are rewarded in relation to selection for party structures if they exhibited sufficient party allegiance, n 36 above, p 8.



that present political parties will dissolve or fragment and reform entirely on ethnic lines.<sup>39</sup> The whole political scenery will thus be distorted by the establishment of new communal political parties which will attract more votes as representation of communities will be more predictable with them.<sup>40</sup> Such a situation will jeopardize the concept of citizenship and nationhood, as more than ever, citizens will feel that they belong to a particular community to the exclusion of all others. The message that would be sent through the ethnic consolidation of political parties will be that at grassroots the citizenry should equally demarcate themselves on ethnic lines.

The beauty of having different communities in the same political party, each one reinforcing one another in a spirit of brotherhood and conviviality, and where they all fight in unison for political ideals and agendas will be lost forever. Ethnicity or extremism<sup>41</sup> will overshadow and engulf political ideals which form the basis of most political discussions before elections. Instead, political discussions will be vetoed by ethnic discussions, and it is only after political parties have been elected and the government established that political ideals, agendas and strategies will be discussed, in the improbable event that they had been crafted before. Encouraging a political system where political parties are formed on ethnic lines will promote belief that ethnicity and religion are the only solutions to protect a group's rights,<sup>42</sup> or at least the basic premise to start solving disputes. When day to day issues are seen through the lens of ethnicity or religion, differences between communities will become much sharper.<sup>43</sup>

It is clear that PR might represent minorities in a better way than majoritarian systems.<sup>44</sup> However, such representation will put in peril the multi-ethnic harmony and notion of citizenship which the FPTP system forces political parties to stand for and to cultivate.

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<sup>39</sup> The Electoral Knowledge Network 'Disadvantages of PR Systems' (2009) available at <<http://aceproject.org/ace-en/topics/es/esd/esd02/esd02b>> (accessed 2 September 2009); the article lists the 'destabilising fragmentation of the party system' as one of the disadvantages of PR and cites the example of Israel where extreme religious parties become crucial to the formation of a coalition government. It states that democratizing countries are often fearful that PR may allow ethnic-cleavage parties to proliferate in their undeveloped party systems.

<sup>40</sup> It should be remembered that the Report of the Commission on Constitutional and Electoral Reform (the Sachs Report) found that communal parties cannot be prohibited unless the Constitution is amended to insert a provision that would allow the promulgation of a law to limit the right to form political parties to prevent incitement to religious, ethnic, racial, communal, caste or gender hatred or to inhibit the fomenting of division based on same, n 26 above, para 73(3).

<sup>41</sup> PR has also allowed the formation of communal parties which turned out to be extremist as it allowed the small Nazi Party to get a grasp of the electorate in Weimar Germany, JA Douglas 'Common Critics of PR and Responses to Them' (2009) available at <[http://www.mtholyoke.edu/acad/polit/damy/articles/common\\_criticisms\\_of\\_pr.htm#extremism](http://www.mtholyoke.edu/acad/polit/damy/articles/common_criticisms_of_pr.htm#extremism)> (accessed 2 September 2009).

<sup>42</sup> n 35 above, p 15.

<sup>43</sup> n 35 above, p 15.

<sup>44</sup> n 35 above, p 14.

## **2.2 PR in an electoral system with a significant minority**

PR might be the solution in countries where there is one minority constituting a small percentage of the population. In such a situation, the inclusion by a political party of one or two members of the minority in the proportional list will satisfy the minority, and attract the minority electorate.<sup>45</sup> In Mauritius however, nearly 50% of the population consists of different minorities, a situation which is unique in the world.<sup>46</sup> Prof Yash Ghai from Minority Rights Group International in his conclusions on how participation by minorities should be facilitated and structured has reiterated that the choice between the different options available will depend on objective circumstances which vary from place to place and the size of the minority can be a material factor.<sup>47</sup> Altogether, PR does not offer sufficient foreseeable results to allow political parties to remain heterogeneous in terms of communities, and still convince the minority electorate that they will be elected.

## **2.3 Demarcation of electoral boundaries**

The way electoral boundaries have been demarcated in Mauritius may also allow minorities to be represented even if they had to rely on their sole minority votes. The votes of minorities might suffice to make a minority candidate be elected at least to the third position in a constituency, even if the minority candidate was not supported by any member of the majority. This is because the FPTP system elects not one candidate but three per constituency. In this respect, the FPTP system has proved fruitful for many minority candidates so far as some minority candidates were elected to positions which were even better than majority candidates in the same constituency.<sup>48</sup> One learned author rightly pointed out there has been some

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<sup>45</sup> The inclusion of such minority candidates should be reasonably high up in the list to guarantee that the minority candidates would be taken up as parliamentarians should the political party win a substantial number of votes.

<sup>46</sup> This Mauritian situation can be contrasted with the following 'full democracies' where PR lists are used. In Sweden, the most democratic country in the world according to the EIU Index, around 87% of the Swedish population belongs to the Catholic Church, thus only 13% are religious minorities from data obtained at <[http://www.wordiq.com/definition/Demographics\\_of\\_Sweden](http://www.wordiq.com/definition/Demographics_of_Sweden)> (accessed 24 August 2009). In Portugal, which is again more democratic than Mauritius according to the EIU index, the religious minorities seem to account for not more than 5% of the whole population according to data obtained at <<http://www.wordiq.com/definition/Portugal>> (accessed on 24 August 2009). In Switzerland, the world's 8th democracy, around 18% of the population only constitutes religious minorities from data obtained at <<http://www.newworldencyclopedia.org/entry/Switzerland#Religion>> (accessed on 24 August 2009). In Iceland, the 3rd democracy of the world, only around 10% of the population constitutes religious minorities as provided at <[http://www.wordiq.com/definition/Demographics\\_of\\_Iceland](http://www.wordiq.com/definition/Demographics_of_Iceland)> (accessed on 25 August 2009). Mauritius is one of the very rare examples of a country where religious minorities account for nearly 50% of the population.

<sup>47</sup> Y Ghai 'Public Participation and Minorities' (2003) 27.

<sup>48</sup> For instance in Constituency 15 for the general elections held on 3 July 2005, a Muslim candidate, was elected at the top of the list although it is known that Muslims are a minority in that Constituency, which shows that he won

gerrymandering in the delimitation of electoral boundaries which was done 'on purpose' so that all ethnic groups are adequately represented in parliament.<sup>49</sup> The 'ethnic delimitation' of the electoral boundaries seems to be confirmed by two factors: firstly, the constituencies have a significant disparity in terms of number of electors;<sup>50</sup> secondly, all major political parties field candidates of the same community combination in each constituency.<sup>51</sup>

#### **2.4 Assessing the Sachs Commission's recommendation**

The Sachs Commission recommended 62 FPTP seats with 30 PR seats.<sup>52</sup> Without discrediting the merits of such a system as depicted by the learned commissioners, a doze of PR amounting to 32% of the seats will encourage the formation of political parties based on ethnic lines and the results of the PR polls run the risk of standing in stark contrast with the results of the FPTP in terms of community representation. A marked difference in the results between the two systems will only aggravate ethnic tensions as some communities will feel they are missing out on political opportunities which are better represented through PR.

Useful and thought-provoking will it be also to mention collaterally that PR lists, especially the closed lists are criticized for contributing to political corruption as the electorate vote the party and not individual candidates, and thus cannot impose an electoral sanction by choosing to oust corrupt representatives<sup>53</sup> who have exhibited bad governance during the government tenure. It is however not in the scope of this thesis to delve in this argument further.

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votes cast by a broad electorate composed of all communities. General election results are available on [lexpressonline](http://www.lexpress.mu/Services/archive_45557_LE-NOUVEAU-PARLEMENT) at <[http://www.lexpress.mu/Services/archive\\_45557\\_LE-NOUVEAU-PARLEMENT](http://www.lexpress.mu/Services/archive_45557_LE-NOUVEAU-PARLEMENT)> (accessed 25 August 2009).

<sup>49</sup> R Sithanen 'Coalition politics under the tropics: office seekers, power makers, nation building' (2003) 4.

<sup>50</sup> For the 2005 General Elections, Constituency 3 registered 17032 valid votes(ballots) while Constituency 5 had 40992 valid votes which is more than twice the amount, from Electoral Commissioner's Office 'National Assembly Elections 2005' (2005) 5,9 available at <<http://www.gov.mu/portal/goc/eco/file/nae2005.pdf>> (accessed 4 September 2009); The same ratio of disproportion is seen by looking at the number of registered electors from the two constituencies as at 2009, Electoral Commissioner's Office 'Statistics on Registers' (2009) available at <<http://www.gov.mu/portal/site/eco/menuitem.9fddd3a041472efa9459d9a365d521ca/>> (accessed 4 September 2009).

<sup>51</sup> As above, the election results show the candidates fielded by the different political parties as well as their community.

<sup>52</sup> n 26 above, para 51(ii).

<sup>53</sup> n 37 above.

## **2.5 Concluding remarks**

In Mauritius therefore, the proposition of this thesis is that the FPTP has to be kept with a dose of PR for the eight additional seats unlike the recommendations of the Sachs Commission which call for a net 22 more seats. Since it is the BLS which is the usual source of contention, reform should be targeted to reforming the additional seats of the BLS alone.

### **Chapter 3: The BLS and discrimination on the basis of race**

This part of the thesis will focus on whether the BLS as it stands, through its full working out, causes discrimination on the basis of race.

#### **3.1 The plaintiff in a claim for discrimination**

The Constitution protects discrimination on the basis of race, only when the discriminatory act is perpetuated by a public body.<sup>54</sup> It is also established in jurisprudence (case law) of Mauritius that the party alleging discrimination has to be an aggrieved party.<sup>55</sup> In the BLS, it has to be understood that minority candidates who disclose their community on the nomination paper before the elections cannot be ‘discriminated’ in terms of the laws of Mauritius as the disclosure would entitle them to an advantage: that of being allocated a ‘Best Loser’ seat if ever they win the sufficient number of votes. All minorities share a chance of being allocated a ‘Best Loser’ seat, and a candidate of the minority community cannot legitimately take the standpoint of being discriminated.

Rather, it is candidates of the majority who can take such a view as despite disclosing their community they would never be given a chance of being allocated a ‘Best Loser’ seat. The UN Human Rights (UNHR) Committee was prompted in 2001 to make a determination on discrimination on the basis of race by the BLS under Article 26 of the International Covenant on Civil and Political Rights (ICCPR)<sup>56</sup> but rejected the case on the ground that the communication sent after five years from the infringement without convincing explanation of the delay constituted an abuse of the right of submission.<sup>57</sup> If at all, it is thus majority candidates who would have a claim in discrimination on the basis of race. However, such a line of reasoning is not tenable, as will be shown below.

#### **3.2 Justification for an alleged discrimination on the basis of race**

The Constitution in itself does not provide that discrimination can be reasonably justified, unlike for instance the South African Constitution where the Bill of Rights can be limited if the

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<sup>54</sup> n 1 above, Sec 16(1). Nonetheless the new Equal Opportunities Act 2008, although not yet promulgated at the time of writing of the thesis, prohibits discrimination from both public and private bodies as it binds the State, Equal Opportunities Act 2008, Sec 3(1).

<sup>55</sup> *Union of Campement Site Owners and Lessees & Ors v The Government of Mauritius and Ors* 1984 MR 100; *Tengur S v The Ministry of Education and Scientific Research & Anor* 2002 SCJ 48.

<sup>56</sup> International Covenant on Civil and Political Rights 1966. Mauritius has ratified the covenant since 1973.

<sup>57</sup> Communication 787/1997, *Gobin v Mauritius*, UNHR Committee (16 July 2001), UN Doc CCPR/C/72/D/787/1997 para 6.3.

limitation is reasonably justifiable in an open and democratic society based on human dignity, equality or freedom.<sup>58</sup> Still, regard should be had to the freshly enacted, but not yet promulgated, Equal Opportunities Act (EOA) which expands the grounds of discrimination, specifying 'ethnic origin' clearly as a ground,<sup>59</sup> and which differentiates between direct and indirect discrimination.<sup>60</sup> Direct discrimination causes discrimination by an act which is caused directly by the discriminator, and such discrimination cannot be reasonably justified.<sup>61</sup> Indirect discrimination is discrimination caused by the imposition of a condition, requirement or practice on the aggrieved person, which has an effect of disadvantaging the aggrieved person.<sup>62</sup> Indirect discrimination will not occur if the condition, requirement or practice can be justified in the circumstances.<sup>63</sup> The BLS spawns a situation of indirect discrimination as the established procedure for the allocation of seats amounts to a 'condition' within the meaning of the law which has been set beforehand and not triggered spontaneously by the hands of the discriminator. In order to determine whether the condition is justified in the circumstances, the factors which can be considered are the nature and extent of the resulting disadvantage,<sup>64</sup> whether the disadvantage is proportionate to the result sought to be achieved by the discriminator,<sup>65</sup> and the likelihood of overcoming or mitigating the disadvantage.<sup>66</sup> Clearly, the latter factor is immaterial in this determination in relation to the BLS as a majority candidate has no likelihood of overcoming the disadvantage of not being elected. The mention of his community on the nomination paper will mark the end of his hopes in securing a 'Best Loser' seat, and there is no departure from this unless he discloses another community. Considering the relevant factors for assessing justifiability, the nature and extent of the resulting disadvantage is clear: loss of a parliamentary seat. Such a factor cannot thus atone the indirect discriminatory effect of the BLS. The pivotal point which is of utmost relevance is thus the last factor that is whether the disadvantage is proportional to the results sought to be achieved by the discriminator.

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<sup>58</sup> South African Constitution 1996, Art 36.

<sup>59</sup> Equal Opportunities Act 2008, Sec 2.

<sup>60</sup> As above, Sec 5 & 6.

<sup>61</sup> n 59 above, Sec 5(1)(a).

<sup>62</sup> n 59 above, Sec 6(1)(a) & (c).

<sup>63</sup> n 59 above, Sec 6(1)(b).

<sup>64</sup> n 59 above, Sec 6(3)(a).

<sup>65</sup> n 59 above, Sec 6(3)(c).

<sup>66</sup> n 59 above, Sec 6(3)(b).

### 3.3 Assessing proportionality of disadvantage

The purpose of the BLS is to 'ensure a fair and adequate representation of each community'<sup>67</sup> which is the result that the 'discriminator' under the EOA seeks. On legal analysis, the BLS may be construed as an affirmative measure which is permissible under the law, as mirrored in the Constitution of other jurisdictions. In South Africa for instance, affirmative measures are recognized in the Bills of Rights whereby legislative and other measures designed to protect or advance persons disadvantaged by unfair discrimination can be taken to promote the achievement of equality.<sup>68</sup> In other words, legislative measures can be taken to promote the achievement of equality for citizens already disadvantaged by discrimination. The BLS can thus be construed as an affirmative measure if the presumption at the time of the drafting of the Mauritian Constitution was that minority communities were unfairly discriminated when it came to representation in Parliament. This presumption can be inferred by the motivation of the drafters to 'ensure fair and adequate representation of each community'. It is thus likely that the disadvantage of the majority candidate in losing a parliamentary seat is proportional to the results sought to be achieved by the discriminator, within the meaning of the EOA. According to the Act, the burden would lie on the discriminator to prove that the imposed condition is justifiable in the circumstances;<sup>69</sup> the burden of proof would thus be shifted to the State should a case based on discrimination in relation to the BLS be entered.

It is also important to notice that all the factors which should be considered to determine whether the condition is justified in the circumstances are not enumerated.<sup>70</sup> It would thus be left to the appreciation of the judicial body to determine what other factors can be considered in the justifiability of the condition. The South African Constitution is again relevant here as it enumerates a list of comprehensive factors which can be taken into account in deciding whether a limitation is reasonable and justifiable.<sup>71</sup> By alluding to the limitation provision in the South

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<sup>67</sup> n 1 above, First Schedule, Sec 5(1).

<sup>68</sup> n 58 above, Sec 9(2).

<sup>69</sup> n 59 above, Sec 6(2).

<sup>70</sup> n 59 above, Sec 6(3) provides that 'the matters to be taken into account in determining whether or not a condition, requirement or practice is justifiable in the circumstances **include...**'

<sup>71</sup> n 58 above, Sec 36(1) which establishes that the factors are the nature of the right, the importance of the purpose of the limitation, the nature and extent of the limitation, the relation between the limitation and its purpose and less restrictive means to achieve the purpose. These factors are furthermore non-exhaustive and depend on the circumstances of the case, as was reiterated in *S v Manamela & Ors* 2000 CCT 25/99 para 32. On this occasion, the Court observed that the limitation test does not in itself enshrine an exhaustive checklist of requirements and it is when the Court has examined the relevant factors (depending on the circumstances) that a balancing exercise should be made between the purpose, effects and importance of the infringing legislation (in the present situation the BLS) and the nature and effect of the infringement (the condition).

African Constitution, one factor other than the result sought to be achieved by the discriminator which will further reinforce the proportionality of the condition *vis à vis* the disadvantage caused is whether there are less restrictive means to achieve the purpose. Obviously, there are no less restrictive means to represent minority communities other than an affirmative measure which is the BLS to push some democratically unelected candidates to parliament. The only other means would be that the workings of direct democracy would have elected them but that is independent of the will of the State.

### **3.4 Concluding remarks**

From the above legal reasoning, it is thus legitimate to assert that the BLS is justified, and thus does not discriminate on majority candidates. The constitutional issue of the BLS could have been resolved by making the BLS a limitation under the constitutional discrimination provision itself. True it is that the ‘protection from discrimination’ provision in the Mauritian Constitution does not include the BLS as one of its permissible limitations.<sup>72</sup> The hypothesis of the BLS causing discrimination on the majority candidates should have been foreseen by the drafters of the Constitution. It is probable that the drafters never envisaged that one day a majority candidate might feel aggrieved and invoke this legal right.<sup>73</sup> Hence, for purposes of ‘legal proof’ and goodwill of the Constitution, the inclusion of the BLS in the limitation provision would have resolved the matter of whether the Constitution is contradicting itself or not. Socially, it might also create less contestation. Other limitations under the discrimination provision are rarely contested as they have remained clear limitations since the existence of the Constitution. For instance, limitations pertaining to tax laws<sup>74</sup> have rarely been contested.

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<sup>72</sup> n 1 above, Sec 16(4), (5) & (7).

<sup>73</sup> It should be remembered that the promulgation of the EOA is still looming although its standards have been used in the present thesis to evaluate the justification for indirect discrimination. The ‘constitutional contradiction’, as one may be tempted to coin it, is still present.

<sup>74</sup> n 1 above, Sec 16(4)(a) provides that the prohibition of discrimination provision does not apply for the appropriation of revenues or other funds of Mauritius.



## Chapter 4: The sanction for non-declaration of the community

The next issue which deserves attention is the sanction under the law which applies in the event a candidate does not mention his community on the nomination paper. The nomination of candidates and the procedure regarding the filling of nomination papers are set out in regulations made by the National Assembly.<sup>75</sup> According to the regulations, each candidate should state which community amongst the Hindu, Muslim, General Population and Sino-Mauritian communities he belongs to for purposes of the general elections.<sup>76</sup> The sanction for non-declaration of the community is that the nomination of the candidate shall be deemed to be void and of no effect.<sup>77</sup> The precise issue of contention here is thus whether the sanction of non-declaration of the community repugates other provisions of the Constitution and blemishes the democratic status of the Mauritian Republic.<sup>78</sup> This point of contention was hiding under cover for the thirty-seven years the Constitution of Mauritius has been operational until members of a new political party 'Rezistans Ek Alternativ' could not decide which community they belonged to, decided not to mention their communities on the nomination paper, and challenged the invalidation of their nominations as well as the sanctioning provision enshrined in the regulations at the Supreme Court.<sup>79</sup>

### 4.1 Litigation concerning the sanction

The Court in the above-mentioned case, *Narrain and Others v Electoral Commissioner and Others*, held that the sanction of nullity of the nomination was in contravention of Section 1 of the Mauritian Constitution which reads that Mauritius is a 'democratic state'. The First Schedule of the Constitution merely provided that for the purposes of the BLS, a candidate should declare his community, it did not provide that the sanction for non-declaration of the community should be nullity of the nomination. Section 12(5) of the regulations was thus declared to have been invalidly enacted as it opposed the spirit and purport of other provisions of the Constitution. In the words of Justice Balancy, the Court observed:

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<sup>75</sup> National Assembly Election Regulations 1968, Sec 12.

<sup>76</sup> As above, Sec 12(4)(c).

<sup>77</sup> n 75 above, Sec 12(5).

<sup>78</sup> n 1 above, Sec 1 reads 'Mauritius is a sovereign democratic State which shall be known as the Republic of Mauritius.'

<sup>79</sup> *Narrain D & Ors v Electoral Commissioner & Ors* 2005 SCJ 159, the applicants claimed that the invalidation of their nomination was '*ultra vires*' the Constitution.

..the fact that such a provision furthers the proper operation of a supplemental election system introduced into the Constitution will not shield it from unconstitutionality and consequent invalidity if it runs contrary to the spirit of the Constitution from another angle by being repugnant to other constitutional provisions designed to protect fundamental rights... the provision imposing the sanction of nullity of nomination for non-declaration of community is tantamount to an unjustified curtailing of the citizen's constitutional right to stand as a candidate for election as a member of Parliament at general elections. Section 1 of our Constitution proclaims that Mauritius is a democratic state and the right to stand as a candidate at general elections is one which is so fundamental for the existence of true democracy that it cannot be easily tampered with..<sup>80</sup>

However, in another litigation shortly afterwards, the *Electoral Supervisory Commission v The Honourable Attorney General*,<sup>81</sup> the Supreme Court composed of a bench of three judges, overruled the line of reasoning adopted in the first judgment and decided that non-declaration of the community in the nomination paper for prospective candidates would entail the invalidity of the nomination, thus redeeming Section 12(5) of the regulations.

#### **4.2 Reasoning of the Court in ESC case**

The Court relied on the following reasons, synthesized below:

Firstly, the meaning of 'democratic state' at Section 1 of the Constitution was narrowly construed by the Court. While the learned judge in the former case provided that the right to stand as candidate in the general elections is the linchpin of a democracy, the full bench of the Supreme Court adopted a 'self-containing' approach to the interpretation of 'democratic state'. Indeed, the learned judges quoted a landmark case, *UDM v Governor General and ors*<sup>82</sup> that in turn reminisces another judgment, and reads as follows:

We have formed the opinion that, with respect to the other Judges of this Court who have been called upon to formulate such a definition for the purpose of section 1, the approach of Ramphul J, as explained in **Lincoln v Governor-General and ors (...)**<sup>83</sup> is the correct one. In short, this is that it is neither necessary nor appropriate to travel outside

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<sup>80</sup> As above, conclusion (2) reached by the Court before holding that Sec 12(c) of the regulation to the extent of invalidating the nomination of a candidate because of non-declaration is repugnant to Section 1 of the Constitution and has been invalidly enacted.

<sup>81</sup> *Electoral Supervisory Commission v the Honourable Attorney General* 2005 SCJ 252.

<sup>82</sup> *UDM v Governor General & ors* 1990 MR 118.

<sup>83</sup> 1974 MR 112, as quoted in ESC above.

our supreme law for the purpose of discovering what the framers of our Constitution had in mind when they used the words “democratic state”, and still less to invoke certain conventions which underlie British constitutional law. What section 1 means is that our State is to be administered in accordance with the other provisions of the Constitution, which contains the essence of the democratic principles governing us..<sup>84</sup>

Hence, since the First Schedule establishing the BLS is another part of the Constitution, the term ‘democratic state’ was taken to already enshrine, agree and accord with the provisions of the First Schedule. On adopting such a line of thought, it would thus seem that no provision of the Constitution, as it stands, can be in contradiction with Section 1. Put another way, all provisions of the Constitution further and define the ‘democratic state’ which the first line of the Constitution introduces.

Secondly, the mandatory nature of the words ‘Every candidate...shall declare’ as they appear in the First Schedule of the Constitution<sup>85</sup> was taken to impose an obligation of declaration of the community on all candidates, without exception. The words ‘in such manner as may be prescribed’ were taken to warrant and validate the sanction of nullity of the nomination as established by Section 12(5) of the National Assembly Election Regulations. To back up this thread of reasoning, the Court recalled *S.Joomun and anor v The Government of Mauritius and anor*<sup>86</sup> where it was reiterated that one of the basic rules of statutory interpretation is that it is to be taken to be the legislator’s intention that an enactment should be read as a whole, be interpreted to implement, rather than defeat the legislative purpose and that the enactment should be coherent and self-consistent.

Thirdly, the Court affirmed that the declaration of community made by a prospective candidate was taken to be at the heart of the BLS as this declaration will be used to allocate the eight ‘Best Loser’ seats which are devised to ‘ensure a fair adequate representation’ of each of the four communities.

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<sup>84</sup> n 81 above.

<sup>85</sup> n 1 above, First Schedule S 3(1) reads that ‘Every candidate for election at any general election of members of the Assembly shall declare in such manner as may be prescribed which community he belongs to and that community shall be stated in a published notice of his nomination.’

<sup>86</sup> *S Joomun & anor v The Government of Mauritius & anor* 2000 SCJ 234.

### 4.3 Critic on the ESC judgment

#### 4.3.1 The interpretation of 'democratic state'

With regards to the narrow meaning of the 'democratic state' which the Court has embraced, and taking into account that no definition of democracy has been given anywhere in the Constitution, it would mean that Mauritius is a 'democratic state' only to the extent that the other provisions of the Constitution has further defined and demarcated the 'democratic state'. Such an avowal might be problematic as it considers that the Constitution, as it stands, squares and accords on all fours with democratic principles upheld in a 'democratic society'. Secondly, it disallows and shuns the scope for any constructive judicial activism. It is agreed widely that a Constitution is a living document and not mere letters inked on paper which has been beautifully shelved in the registry of the judiciary. Democratic principles may also vary and improve with time. An act which was not deemed to be torture yesterday might be deemed to be torture today. Such a change has nothing to do with the amendment of the Constitution requiring a qualified majority. Rather, such change relates to the interpretation of the same provisions now that society has moved forward and assesses democracy with a mature eye. However, such a narrow interpretation gives no room for novel and constructive interpretation which would have occurred through judicial activism. Thirdly, the case of *Lincoln* seems to suggest that Section 1 can only apply indirectly, and precludes any direct application of Section 1. In other words, it seems that no direct legal claim can be made based on an infringement of Section 1 of the Constitution as Section 1, to the extent that the interpretation of 'democratic state' is concerned, simply means that the definition and demarcation of the 'democratic State' has been provided by other provisions in the Constitution. Such a situation can be contrasted with the South African Constitution where the Bill of Rights applies both directly and indirectly, and the principle of avoidance calls for indirect application to be made before direct application.<sup>87</sup> However the case of *Lincoln* precludes all direct application, and limits the

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<sup>87</sup> Direct application refers to a situation where there is a direct infringement of the Bill of Rights that generates a remedy, indirect application refers to a situation where a legislation is interpreted in such a way so as to promote the spirit, purport and objects of the Bill of Rights as laid down in Sec 39(2)(a) of the South African Constitution. In other words, the values of the Bill of Rights are infused in the legislation while an attempt is made at its interpretation. The principle of avoidance would mean, when it comes to statutory law, simply that the court must first attempt to interpret legislation in conformity with the Bill of Rights (indirect application) before considering a declaration that the legislation is in conflict with the Bill of Rights and invalid (direct application), I Currie & J de Waal *The Bill of Rights Handbook* (2005) 24-25, 64. See also *Mhlungu & Ors v S* 1995 CCT /25/94 para 59 and *S v Bequiot Walter* 1996 CCT 24/95 para 12. Case-law even illustrates a formula for dealing with constitutional challenges whereby a judge has to ascertain whether a section conforms with the Constitution before initiating steps leading to a declaration of constitutional invalidity, *Govender v Minister of Safety and Security* 2001 (4) SA 273 para 11.

application to an indirect one. The learned judge in the *Narrain* case made a direct application of Section 1 when he ruled that the invalidation of the nomination in the BLS scheme contravenes with it as the right to stand as candidate for the general elections is fundamental to the existence of true democracy.

Furthermore, even the scope of indirect application is limited. Normally, indirect application would mean that the values in a Bill of Rights (equivalent to Chapter 2 of the Mauritian Constitution embodying civil and political rights) should be permeated in a legal provision when an attempt is made at its interpretation. The values can be discerned by looking at the preamble or a statement of foundational values which normally appears before the substantive provisions. Section 1 of the Constitution seems to sit on the fence. Acting like a preamble, it seems to make an attempt to introduce one such value: the concept of a democracy. Yet, and especially since no definition of the word democracy has been provided in the Constitution, then the Mauritian Bill of Rights has to necessarily harness Section 1 with it in order to give sense to the civil and political human rights enshrined in Chapter 2. If an indirect application of the Bill of Rights has to be conducted, then there is thus a void of foundational values which would explain what is the spirit, purport and object of the Bill of Rights. Basic rules of statutory interpretation as mentioned in the *Joomun* case do not give an answer as to the spirit, purport and object, but only emphasizes that the Constitution should be interpreted in communion with the other provisions. The void of foundational values in the Mauritian Constitution is likely to have the effect of causing a strained interpretation of the Bill of Rights in the event an attempt is made to indirect application, however meager the prospect of success might be. By alluding to South African jurisprudence, the Constitutional Court has warned that interpretations of the Constitution should not be unduly strained.<sup>88</sup>

In making his recommendations on the reform of the electoral process of Mauritius, Justice Sachs hits the nail on the head when he commented that the character of Mauritius is expressed in the laconic statement that it shall be a sovereign democratic state, and that there is no preamble or statement of foundational values unlike the South African Constitution.<sup>89</sup> The South African Constitution has founding provisions in Chapter 1 which establishes that the Republic of South Africa is a democratic state founded on the values of human dignity, achievement of

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<sup>88</sup> *Hyundai Motor Distributors (Pty) Ltd v Smit* NO 2001 (1) SA 545 (CC) para 24. On the same lines, the Constitutional Court of South Africa has also highlighted that reading down (indirect application) is limited to what the text is reasonably capable of meaning, *National Coalition for Gay & Lesbian Equality v Minister of Home Affairs* 1999 CCT 10/99 para 24.

<sup>89</sup> n 26 above, para 72.

equality and the advancement of human rights and freedoms,<sup>90</sup> amongst others. Furthermore, the interpretation of the Bill of Rights has to be made in such a way that it promotes the values that underlie an open and democratic society based on human dignity, equality and freedom.<sup>91</sup>

The recommendation of the Sachs Commission is in fact pertinent as it makes the case for constitutional amendment. The Commission was called upon to make proposals for the prohibition of communal or religious political parties. The Commission cautioned that such a prohibition might raise questions of constitutionality as it would diminish the freedom of assembly and association of members of a political party, be it communal.<sup>92</sup> The Commission commented that only an amendment in the Constitution would make the implementation of such a proposal possible. Limitations of freedom of assembly or association can occur in the public interest.<sup>93</sup> It is only if the Constitution sheds light on what would be taken as the public interest by explicit provisions<sup>94</sup> that such a restriction could have been made according to the Commission. However, in the case of the *Electoral Supervisory Commission v The Honourable Attorney General*, the right to stand as candidate at the general elections has been limited by the requirement of the BLS to declare one's community on the nomination paper. Had the Mauritian Constitution contained a preamble or founding provisions to state the values which should be upheld in a democratic society, and had conditions for limitations been more explicit, the outcome of the case might have been more justified.

#### **4.3.2 Emphasis on the mandatory language**

Another point of contention which transpires from the judgment is the emphasis laid on the mandatory language used through the black-letter of the Constitution. It is known however by borrowing from English and South African Constitutional jurisprudence that a Constitution is an organic instrument and is *sui generis*. As Lord Wilberforce rightly puts it in *Minister of Home Affairs (Bermuda) v Fisher*,<sup>95</sup> a Constitution should be interpreted purposively in order to avoid the 'austerity of tabulated legalism'. The South African Court concurred with the conclusion of Lord Wilberforce in *Government of the Republic of Namibia and Another v Cultura 2000 and Another*, part of which is quoted below:

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<sup>90</sup> n 58 above, Sec 1.

<sup>91</sup> n 58 above, Sec 39(1).

<sup>92</sup> n 26 above, para 71.

<sup>93</sup> n 1 above, Sec 3.

<sup>94</sup> n 26 above, para 73(3).

<sup>95</sup> *Minister of Home Affairs (Bermuda) v Fisher* 1980 AC 319 at 328H.

A Constitution is an organic instrument. Although it is enacted in the form of a statute it is *sui generis*. It must broadly, liberally and purposively be interpreted so as to avoid "the austerity of tabulated legalism" and so as to enable it to continue to play a creative and dynamic role in the expression and the achievement of the ideals and aspirations of the nation, in the articulation of the values bonding its people and in disciplining its Government.<sup>96</sup>

One could argue that the Mauritian Court indeed abided by the 'austerity of tabulated legalism' which is rarely auspicious to constitutional interpretation. Noticeable it is that Section 3(1) of the First Schedule establishing the BLS uses solely the masculine gender.<sup>97</sup> Abiding by the 'austerity of tabulated legalism' would make that only the masculine gender would have had to declare its community from 1968 to 1974 when the Interpretation and General Clauses Act clarified the conundrum.<sup>98</sup> However, a purposive interpretation has still made it that the section covered the feminine gender during that period.

#### 4.3.3 Forcing representation

Finally, the argument that the declaration of the community is central to the BLS is true. However, such an argument is likely to discomfort the concept of a true democracy. One of the pillars of a true democracy is representation. The African Charter on Human and Peoples' Rights (ACHPR) expresses this right to representation when it provides that every citizen shall have the right to participate freely in the government of his country, either directly or through freely chosen representatives in accordance with the provisions of the law.<sup>99</sup> This right is reiterated in the Declaration on the Principles Governing Democratic Elections in Africa.<sup>100</sup> Hence, a person has the right to participate directly in the government of his country, by standing as candidate, and this participation should be free. The issue here is that leeway should be given to a candidate who does not wish to represent any minority community as he may not want to represent them. The sole objective of the BLS to ensure a 'fair and adequate **representation** of each community', representation being taken to mean that the interests of the minority

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<sup>96</sup> *Government of the Republic of Namibia and Another v Cultura 2000 and Another* 1994 (1) SA 407 at 418, also reiterated by the Constitutional Court in *Mhlungu*(n 87 above) para 8.

<sup>97</sup> n 85 above.

<sup>98</sup> The Interpretation and General Clauses Act 1974, Sec 5(1) which provides that words importing the masculine shall include the feminine and the neuter.

<sup>99</sup> African Charter on Human and Peoples' Rights 1986, Art 13(1).

<sup>100</sup> Declaration on the Principles Governing Democratic Elections in Africa 2002, Sec 4(1).

electorate will be represented in parliament. The whole purpose of the BLS will be defeated if it was to compel candidates to represent minorities while in practice they fail to do so. Of course, and as rightly pointed out in the judgment, the candidate can reject the 'Best Loser' seat when it is bestowed onto him, but after the election results, tables might have turned, and he may have other motives to keep the seat other than minority representation. A candidate might also refuse to declare his community if he wants to be known as a neutral candidate who rises above communal politics, and he may even attract an electorate which is a fan of such an ideology. Allowing the electorate to make its best informed choice is the lifeblood of direct democracy.<sup>101</sup> The Supreme Court judgment is assuming that no electoral prejudice whatsoever would fall on a candidate if he declares his community. It would not be fair to compel a candidate to declare his community while he does not want to, and later expect him to let go the 'Best Loser' seat, as there is always a chance that the eyes in which the electorate would view him did they know he would not represent them would differ, whilst they might have voted for another candidate. Even if the candidate refuses the 'Best Loser' seat after the elections, the voters cannot remake their choice. The term 'freely chosen representatives' in the African Charter undoubtedly requires that all the candidates' profiles and agendas are put to the scrutiny of the electorate, such that the electorate can make the best informed choice possible for the candidates which it deems fit can represent it before the elections.<sup>102</sup>

Since the second case was not an appeal of the first case, the only merit of this ping-pong exercise was that the eleven applicants in the first case were able to get nominated without declaring the community to which they belonged.

#### **4.4 Concluding remarks**

The Court adopted a very limiting approach in the second case which shows the judicial restraint engrained in the Mauritian legal system. It is also conceded that an amendment of the Constitution with more explicative provisions would have facilitated judicial activism. The stand

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<sup>101</sup> The UNHR Committee commented that in order to ensure the full enjoyment of rights protected by Art 25 of the ICCPR (voting rights), the free communication of information and ideas about public and political issues between citizens, candidates and elected representatives is essential, General Comment 25 UNHRC 57<sup>th</sup> Session CCPR/C/21/Rev 1/Add 7 para 25. Although this paragraph was more inclined to emphasize the importance of free press and other media to inform public opinion, it can be reasonably inferred that the Committee here established a link between information and ideas relating to the candidate's profile and the informed opinion of the electorate which influences its choice.

<sup>102</sup> Such a view is conform to the 'effective participation of citizens in democratic processes' and the notion of 'popular participation' in the African Charter on Democracy, Elections and Governance 2007, Art 3(7) & 4(2).



of this analysis is thus that the present sanction for non-declaration of the community for the BLS, which is invalidation of the nomination, when tested with other national, regional and international norms in fact appears to infringe on the right to stand as candidate for the general elections, which is the first stepping stone of a democracy.

## Chapter 5: The BLS and negative freedom of association

Another human right implication which stands out from the BLS is that it applies only to candidates who are members of a political party.<sup>103</sup> An independent candidate who is of a minority community cannot thus benefit from a 'Best Loser' seat. Nonetheless, an independent candidate on winning the required number of votes to pierce through the first three seats in a constituency will legitimately become a parliamentarian, and may choose to join any political party or party alliance afterwards.

### 5.1 Freedom of association and its negative right

While all the major UN human rights instruments recognize a right to free association,<sup>104</sup> so does the African Charter<sup>105</sup> and the Constitution of the Republic of Mauritius.<sup>106</sup>

Manfred Nowak, in his CCPR Commentary, reiterates that membership in an association must be voluntary, and that this also applied to direct or indirect sanctions tied to membership or non-membership in an association.<sup>107</sup> Important it is also to note that under the Universal Declaration of Human Rights, there is an explicit prohibition to compel an individual to belong to an association, making clear the existence of negative freedom of association.<sup>108</sup> The present issue is that the BLS imposes an indirect sanction tied to non-membership: that of not being eligible for a 'Best Loser' seat.

### 5.2 Analysis of the limitation

#### 5.2.1 The three limbed test

The next step is thus to find whether such a limitation for the independent candidate who cannot benefit from a 'Best Loser' seat because of his failure to join a political party is permissible under the Mauritian Constitution. Indeed, freedom of association under the Mauritian Constitution is accompanied by an internal limitation.<sup>109</sup> The internal limitation

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<sup>103</sup> n 1 above, First Schedule, Sec 5(1) which clearly mentions that a 'Best Loser' seat should 'be allocated to persons belonging to parties who have stood as candidates for the elections as members at the general election but have not been returned as members to represent constituencies.'

<sup>104</sup> The Universal Declaration of Human Rights (UDHR) 1946, Art 20(1); n 56 above, Art 22(1).

<sup>105</sup> n 97 above, Art 10(1).

<sup>106</sup> n 1 above, Sec 13(1) which states that 'except with his own consent, no person shall be hindered in the enjoyment of his freedom of assembly and association, that is to say, the right to assemble freely and associate with other persons.'

<sup>107</sup> M Novak *UN Covenant on Civil and Political Rights: CCPR Commentary* (2005) 499.

<sup>108</sup> n 104 above, UDHR.

<sup>109</sup> n 1 above, Sec 13(2).

follows the three limbed test which is as follows: Firstly, the limitation should be prescribed by law or allowed to permeate under the authority of a law; Secondly, the limitation should be based on one or more of the purposes set out in the provision which are defence, public safety, public order, public morality, public health and for the purpose of protecting the rights or freedoms of other persons;<sup>110</sup> Thirdly, the limitation should be reasonably justifiable in a democratic society. The limitation for the independent candidate who cannot benefit from a 'Best Loser' seat surely does not have a purpose related to the above enunciated purposes to the exception of the 'protection of the rights or freedoms of other persons', which remains arguable.

### **5.2.2 The right or freedom of other persons**

In this situation, the 'right or freedom of other persons' would be the right of the minority candidate to represent the minority community on the hypothesis that such a right can be read from the Constitution when it depicts the purpose of the BLS 'to ensure a fair and adequate representation of each community'.<sup>111</sup> However, the vow of the Constitution to guarantee a fair and adequate representation of each community can barely be equated to a right to represent the minority communities, and a right to represent the minority communities can only be seen to transfuse indirectly through the BLS. In other words, the BLS aims to ensure fair and adequate representation of each community, but does not give a legal right to minority protection which can be vindicated in a court of law.<sup>112</sup>

### **5.2.3 A separate legal right to represent minorities**

Surely, even the legal right to minority protection would not make minorities above the law unless they are favoured by clear affirmative measures. A right to minority protection would rather be a right enshrined in a legal instrument which recognizes and reminisces that a state has minorities which should be protected and be afforded all the other rights equally and without any form of discrimination.<sup>113</sup> This legal right to minority protection may be derived

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<sup>110</sup> n 1 above, Sec 13(2)(a) & (b).

<sup>111</sup> n 1 above, First Schedule, Sec 5(1).

<sup>112</sup> Indeed, the 'right or freedom of other persons' at Sec 13(2) (b) of the Constitution can only mean a legally attributed right or freedom.

<sup>113</sup> Declaration on the Rights of Persons Belonging to National or Ethnic, Religious or Linguistic Minorities 1992, Art 3(1); European Convention for the Protection of Human Rights and Fundamental Freedoms 1953, Article 14 which prohibits discrimination on the ground of association with a national minority; Protocol 12 to the Convention for the Protection of Human Rights and Fundamental Freedoms 2000; European Social Charter 1999, Art E; Framework

from an instrument embodying soft law<sup>114</sup> or an instrument representing hard law,<sup>115</sup> being clear that the instruments are incorporated in the national legal system. The common denominator of such a right is that its recognition in a legal instrument allows it to be used for binding or persuasive authority in a judicial or quasi-judicial body, and it contributes to the substantiation of the right which allows the claimant to benefit from a remedy.<sup>116</sup> Purposes for limitations of freedom of association, on referring to protection of the rights and freedoms of others, refer to a legal right or freedom which can be vindicated. Such a right is not necessarily envisaged by the BLS by providing 'a safe and adequate representation of each community'. Furthermore, it has never been made clear through jurisprudence of the BLS whether it is an affirmative measure conferring such a right or not. Hence, it can be affirmed that the purpose of the BLS is not predisposed by the established limitative purposes under freedom of association in the Constitution.<sup>117</sup>

#### 5.2.4 Reasonably justifiable in a democratic society

As Mauritian case-law has not ironed out whether the limitation on negative freedom of association imposed by the BLS is reasonable in a democratic society, then regards should be had to regional and international norms.

The UNHR Committee has precisely stated in relation to voting rights<sup>118</sup> that the right of persons to stand for election should not be limited unreasonably by requiring candidates to be members of parties.<sup>119</sup> It also observed that even if the Covenant does not impose any particular electoral system, any system operating in a State party must be compatible with the rights protected by

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Convention on the Protection of National Minorities 1998, Art 4(1); Document of the Copenhagen Meeting of the Conference of the Human Dimension of the CSCE 1990, Art 32, the latter legal instrument enumerates minority rights. Furthermore, it has been recognized that a democracy despite abiding to majority rule has to take other values into account besides political equality, such as the protection of minorities and the respect for rights, A Mc Gann *The Logic of Democracy: Reconciling Equality, Deliberation and Minority Protection* 89.

<sup>114</sup> As above, the UN Declaration.

<sup>115</sup> n 56 above, Art 27 that persons belonging to ethnic, religious or linguistic minorities should not be denied the right, in community with other members of their group, to enjoy their own culture, to profess and practice their own religion, or to use their own language.

<sup>116</sup> The UN Human Rights Committee (UNHRC) commented that the minority rights under Art 27 of the ICCPR establishes and recognizes a right which is conferred on individuals belonging to minority groups and which is **distinct from, and additional to**, all the other rights which, as individuals in common with everyone else, they are already entitled to enjoy under the Covenant, General Comment 23 UNHRC 50<sup>th</sup> Session CCPR/C/21/Rev 1/Add 5 para 1.

<sup>117</sup> Arguably, the ground of public order at Sec 13(2)(a) can be considered to be a limitative purpose for legitimizing restriction on the negative right to free association, however the presumption would then be that lack of representation of minorities would inevitably cause public disorder, a presumption which lacks causality and which anyway should not be taken to be true in peaceful Mauritius.

<sup>118</sup> n 56 above, Art 25.

<sup>119</sup> n 101 above, para 17.

Article 25.<sup>120</sup> On the other hand, the African Charter does not refer to a democratic society but accepts limitations subject to the obligation of solidarity.<sup>121</sup> This obligation gives birth to numerous duties for the individual,<sup>122</sup> but in the present context the relevant ones are the duty to preserve and strengthen social and national solidarity, particularly when the latter is threatened,<sup>123</sup> and to preserve and strengthen positive African cultural values in the spirit of tolerance and to contribute to the promotion of the moral well-being of society.<sup>124</sup>

### 5.2.5 Assessing the reasonableness of the limitation

The assumptions of the limitation seem to be threefold: The concern of minorities can only be heard when the minorities form part of a political party; decisions or voting will be taken unanimously in the political party, that is, by consensus;<sup>125</sup> there will be no 'drop-outs' of the 'Best Loser' from the political party following which the dropped-out candidate occupies an independent seat.

To rebut the first two assumptions, it suffices to say that more than once, minority parliamentarians have joined their hands together for one cause, no matter which political party they belong to, and what is the general consensual policy of the latter.<sup>126</sup> Such being the case, the reason of confining 'Best Loser' seats to political parties loses its essence, as minority parliamentarians, even when independent, will assemble and cluster for a cause if need be. Moreover, this is all the more true as political parties in Mauritius are not ethnic based or rarely so, and tend rather to recruit members and propose candidates who include all minorities.<sup>127</sup> It is also true that numerous 'cross-overs' or 'drop-outs' have occurred in the political realm over the years such that parliamentarians have become independent after leaving their political

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<sup>120</sup> n 101 above, para 21.

<sup>121</sup> n 99 above, Art 10(2).

<sup>122</sup> n 99 above, Art 29. The article consists of 8 subparts, each establishing a separate duty.

<sup>123</sup> n 99 above, Art 29(4).

<sup>124</sup> n 99 above, Art 29(6).

<sup>125</sup> Restricting the 'Best Loser' seats to a political party assumes that minorities will voice their opinion in the political party which will then vote by consensus in favour of the minority.

<sup>126</sup> After the Supreme Court judgment in March 2003 which constrained mosques to use speakers only inside the building as outside use contravened the Noise Prevention (Quatre-Bornes) Regulations 1939 and 1955, a 'common platform' of parliamentarians of the Muslim community from different political parties concerted to lobby the government to amend the environmental regulations, 'Lois Antibruit: des amendements proposés pour maintenir l'utilisation de haut-parleur' *L'Express* (26 March 2007) available at <[http://www.lexpress.mu/Services/archive\\_83255\\_LOIS-ANTIBRUIT](http://www.lexpress.mu/Services/archive_83255_LOIS-ANTIBRUIT)> (accessed 29 August 2009).

<sup>127</sup> n 36 above.

parties.<sup>128</sup> ‘Drop-out’ parliamentarians may well be minority candidates who have won a ‘Best Loser’ seat.

From the above, it is thus dubious whether the limitation would survive the reasonableness criteria.

### 5.2.6 Balancing the limitation with the obligation of solidarity

It seems that the limitation imposed on negative freedom of association for the BLS can draw more support from the African Charter than the ICCPR which goes by the reasonableness criterion, if it is agreed that the BLS strengthens social and national solidarity and promotes the moral well-being of society. As pointed out in the judgment of *Sir Gaetan Duval v Francois*, the BLS may achieve both purposes by using the political party as a vehicle in order to outrun the communalism ingredients which the BLS itself seems to introduce.<sup>129</sup>

### 5.3 Concluding remarks

The result of this analysis of the three-limbed test shows that the BLS is brimming inconsistency with negative freedom of association guaranteed under the Mauritian Constitution. While the General Comment of the UNHR Committee makes it clear that the negative right is

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<sup>128</sup> Mr Eric Guimbeau, a parliamentarian recognized to be in a minority community, had left the ranks of the MMM after the 2005 General Elections, and joined the leader of the PMSD, Maurice Allet, who also broke loose of the MMM-MSM alliance. The PMSD with Eric Guimbeau had then two parliamentarians. They sat in the opposition independent of any major party before joining the *Alliance Sociale* which is the coalition party in power. Later, the PMSD broke off from the government again to reintegrate the ranks of the opposition with the MMM. In March 2009, the parliamentarian affirmed that the PMSD might envisage a come-back in the *Alliance Sociale*. Indeed, the PMSD merged with the PMXD under the aegis of the *Alliance Sociale* in September 2009, but Mr Guimbeau walked out as an independent parliamentarian. These facts are retrieved chronologically from ‘Les Stratégies du MSM’ *Week-End* (5 March 2006) available at <<http://www.lemauricien.org/weekend/060305/op.htm>> (accessed 27 August 2009); ‘Têmpete dans un verre...?’ *Mauritian Times* (28 September 2007) available at <<http://www.mauritiustimes.com/280907calypso.htm>> (accessed 27 August 2009); ‘Eric Guimbeau du PMSD: C’est maintenant que le film des alliances commence’ *L’Express* (30 March 2009) available at <<http://www.lexpress.mu/Story/2228~Eric-Guimbeau-du-PMSD---C-est-maintenant-que-le-film-des-alliances-commence->>> (accessed 28 August 2009); ‘Ramgoolam rachète un PMSD en solde’ *L’Express* (6 September 2009) available at <[http://www.lexpress.mu/Services/epaper\\_57995\\_-b--Ramgoolam-rachète--un-PMSD-en-solde--b->](http://www.lexpress.mu/Services/epaper_57995_-b--Ramgoolam-rachète--un-PMSD-en-solde--b->)> (accessed 11 September 2009).

<sup>129</sup> *Sir Gaetan Duval v Francois* 1982 MR 84 where in the words of Justice Lallah ‘A complex system was devised in Schedule I to our Constitution which, while giving effect in some measure to communal considerations, institutionalised the political party as a vehicle to ward off those evils and dangers. **Thus, in this system, communal parties could not expect to fare well in all twenty one constituencies.** In normal circumstances, no independent candidate nor any party which had not returned at least one candidate could participate in the allocation of additional seats. But, most importantly, while the allocation of the first four of the eight additional seats was made to be determined by communal considerations, the party was given the constitutional guarantee to claim its rights in relation to the allocation of the remaining four seats a measure clearly designed as much to encourage multicommunal parties, if they had any pretensions to form a government as to prevent the result of the elections from being frustrated by depriving a party of a majority that it had democratically won.’

contravened,<sup>130</sup> the limitations cannot be justified under the reasonableness criterion under the ICCPR and the Mauritian Constitution, although the obligation of solidarity of the African Charter is more sympathetic to the BLS. Moreover, even if the limitation was reasonably justified, there has to be a legal right to protect in the first instance. The reform of the BLS will thus have to eliminate the shadow of doubt which is cast by the actual status of the BLS against the negative right to freedom of association.

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<sup>130</sup> n 101 above.

## **Chapter 6: The BLS and explicit mention of communities**

There is a climate of opinion in Mauritius that the explicit mention of communities in the Constitution for the purposes of the BLS hampers on democratization. Since the BLS is often accused of seeding communalism,<sup>131</sup> which in turn infers that there is underlying discrimination associated with the BLS. However, it is important to understand that this accusation of the BLS relied on and is shaped by a climate of opinion which has been remained clouded for many years.

### **6.1 The climate of opinion that ethnicity is a sensitive topic**

The climate of opinion that ethnicity is a sensitive topic is likely to have been buttressed by a number of factors, which have been recollected from writings by several authors on the state of democracy in Mauritius, and they are as follows:

#### **6.1.1 The fight for independence**

Firstly and according to undisputed history, some minority communities were opposed to the granting of independence. At that time the main political parties were the Mauritius Labour Party (MLP) and the Parti Mauricien Socialiste Démocrate (PMSD). The main reasons why the wave in favour of independence was to be refused were economic and communal, as some authors have observed:

Political debate centred on whether Mauritius should opt for independence- the course espoused by Labour [MLP]- or whether its association with Britain should be maintained. Debate centred on the presumptive economic benefits and dangers of the two options. While [MLP] could hope to win an election thanks to the numerical strength of the Indian Community, the policy [of PMSD] reflected the fear of Hindu domination prevailing among Creoles, Franco-Mauritians and Chinese.<sup>132</sup>

The fact that the very existence of Mauritius as an independent State was fought on communal terms has shaped the climate of opinion that ethnicity is a sensitive topic.

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<sup>131</sup> n 22 above, *L'Express*. The learned author mentioned that 'ethnic considerations written in the Constitution for the designation of Best Losers' amounts to 'allowing the cancer of communalism to vitiate the very foundation of our democratic framework.'

<sup>132</sup> T Lodge et al *Compendium of Elections in Southern Africa* (2002) 163, names of leaders have been replaced by the party names in brackets.



### **6.1.2 The state of emergency**

Secondly, Lijphart underpinned that democracy lapsed for several years in the early 1970s in Mauritius, and citing Bowman and Brautigam, he described that there was a state of emergency in force from 1971 to 1976, opposition leaders were imprisoned, labour unions were banned and the 1972 elections were postponed to 1976.<sup>133</sup> Lodge, Kadima and Pottie explained that this disturbance was in part caused following a radical movement to rid the country of communalism:

From 1969 onward the MLP faced a formidable opposition party, the Mouvement Militant Mauricien (MMM). The MMM began as a radical movement of young educated Mauritians of different ethnic origins dedicated to rigging the island of communalism. It rapidly established a strong power base among workers, and in 1971, instigated highly disruptive strikes and violence. These led to a state of emergency being declared and political activity was largely proscribed between 1973 and 1975. The elections due in 1972 were deferred until 1976.<sup>134</sup>

### **6.1.3 The ban of the ethnic census**

Thirdly, there is no doubt that the ban of the ethnic census in the 1980s has reinforced and made greener the climate of opinion that ethnicity is a sensitive topic. However, for purposes of awareness and academia, this thesis is opening a parenthesis at this point to highlight other jurisdictions' approach to ethnic censoring.

In terms of democracy rankings, Mauritius ranks just after the United Kingdom, both countries being classified as full democracies.<sup>135</sup> However, noticeable it is to observe that in the United Kingdom, which is more democratic than Mauritius according to the ranking, the Office of the National Statistics of the government conducts regular ethnic census, the last one having been conducted in 2001, and makes the results widely known.<sup>136</sup> The United Kingdom was also the most recent colonial regime which crafted and handed over the commonwealth type written Constitution in the hands of the Mauritius National Assembly. In more ways than not, the Mauritian political system mirrors that of the United Kingdom. The United States of America,

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<sup>133</sup> A Lijphart *Patterns of Democracy: Government Forms and Performance in Thirty-Six Countries* (1999) 53.

<sup>134</sup> n 132 above, p 166.

<sup>135</sup> n 5 above.

<sup>136</sup> The breakdown of the different ethnicities in the United Kingdom are Whites (92.1%), Mixed (1.2%), Asian or Asian British (4%), Black or Black British (2%), Chinese (0.4%) and Other (0.4%), available at <<http://www.statistics.gov.uk/cci/nugget.asp?id=273>> (accessed 18 August 2009).

another full democracy,<sup>137</sup> is now on its twenty-second ethnic and racial census, the last one being in 2000, and it will soon have its twenty-third decennial census in 2010. The information produced in the 2000 census has been entitled for use in the apportionment of the 435 seats in the US House of Representatives among 50 states and in the drawing of new boundaries for congressional, state and local election districts.<sup>138</sup>

Such an analysis is **not to say** that an ethnic census should be reconducted, or even encouraged. However, the stigma which plagues the Mauritian population at the very mention of ethnicity, and the possible accentuation of the stigma by the ban on the ethnic census, should at least be mitigated by the mere knowledge that other full-fledged democracies, one of which Mauritius shares a strong historical past, are also having recourse to such mechanisms in order to better understand and represent the beautiful diversity and rich miscellany of their population.

#### **6.1.4 Riots after death of a famous singer**

It suffices to say here that riots in 1999 after the death of famous reggae singer Kaya is often mentioned of having ethnic roots.<sup>139</sup>

Altogether, the above four events, that is the fight for independence, the democracy breakdown in 1976, the ban of the ethnic census and the death of singer Kaya in order of chronology have set a scary picture on the ways in which ethnic issues can degenerate and have given way to a biased climate of opinion which now condemns the BLS fervently in all its facets as the BLS makes explicit mention of communities. Criticism has become especially easy now that the communalism tag has been so much glued to the BLS that any potential author whilst repeating the same assertion cannot possibly be blamed of being carried by the avalanche of derogatory qualifications which already qualify the system.

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<sup>137</sup> n 5 above. According to the index, the US is the 18<sup>th</sup> best democracy in the world with the index for 'political participation' being 7.22 while that of Mauritius being 5.00.

<sup>138</sup> Minnesota Senate 'The Census' (2003) available at <<http://www.senate.leg.state.mn.us/departments/scr/redist/red2000/ch1censu.htm>> (accessed 21 August 2009); The categories for race in the US are American Indian or Alaska Native; Asian; Black or African American; Native Hawaiian or Other Pacific Islander; White; other race. The categories for ethnicity are Hispanic or Latino and Not Hispanic or Latino, from US Census Bureau 'Race and Ethnic Classifications Used in the Census 2000 and Beyond' (2008) available at <<http://www.census.gov/population/www/socdemo/race/racefactcb.html>> (accessed 22 August 2009).

<sup>139</sup> MG Marshall & K Jagers 'Polity IV Country Report 2007: Mauritius' (2007) 2 available at <<http://www.systemicpeace.org/polity/Mauritius2007.pdf>> (accessed 23 August 2009).

## 6.2 Recognition of ethnic groups

It is no secret, as reiterated by Dr Benjamin Reilly from the Australian National University, that an approach to elections and conflict management is to explicitly recognize the overwhelming importance of group identity in the political process, and to mandate this in the electoral law.<sup>140</sup> In his illustrations of how group identity is incorporated in the electoral law as a proponent of conflict management, he mentions the BLS of Mauritius.<sup>141</sup> It is incumbent on a society to decide whether or not its ethnic groups are sufficiently represented through the electoral system. If they are, then there is no need of accommodating reserved seats for minority communities. If they are not, then there is a need, all the more so if under-representation will lead to societal conflicts. The situation can only be dichotomous. The answer will be a binary 'yes' or 'no'. If it is agreed firstly that ethnic minorities are under-represented, and secondly that such under-representation can lead to conflicts, then the solution is mathematical: the electoral system, or part of it, **has to be** accommodated for the minorities. At the very moment a society has agreed to protect 'minorities', at this very instance it has also agreed to make a necessary distinction between the 'majority' and the 'minority' community. The law does not operate in a dark vacuum where it is expected to have the eyes to discern between which candidates are minority candidates and which are not. Minorities cannot be protected unless the law identifies them and discerns who the minorities are. The law will operate properly provided it is given the necessary input: the declaration of the community on the nomination paper. It is clear that between the time the Constitution was drafted four decades ago and present day, much water has flown under the bridge, which makes it that the ordinary citizen will tend to forget the reasons which motivated the declaration of the community on the nomination paper. Hence, stating that the BLS causes communalism is half-truth only. Stating that the obligation to declare the community on the nomination paper and the associated requirement enshrined in the Constitution **highlights** and **reminds** the Mauritian population of its differences is true, but that system which brings this reminder is necessary, all the more so to prevent the differences from becoming more and more pronounced through under-representation of the minorities. There is a fine line between causing communalism and highlighting necessary ethnic differences for an electoral purpose which at the end of the process in fact atones or mitigates the same ethnic

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<sup>140</sup> B Reilly 'Government Structure and Electoral Systems' (2003) 10, available at <<http://www.cic.nyu.edu/peacebuilding/oldpdfs/E20GovtStructureElectoralSystemsReilly.pdf>> (accessed 18 August 2009).

<sup>141</sup> As above, p 11-12.

differences. As ethnicity is a notorious issue in small and multi-ethnic Mauritius where all ethnicities are made to mingle everyday, the half-truth that the BLS causes communalism can easily convince and incite the ordinary citizen who gets acquainted with the issue for the first time. Such easy persuasion can also become a political tool to show that the government is not taking any measure to combat engrained communalism. However, having delineated the complexities involved with the BLS, the deduction in this part of the thesis is that it does not create communalism and hamper the democratization process.

Furthermore, a system which aims to protect minorities through ensuring a 'fair and adequate representation of each community' is not unique to Mauritius. The next part of the thesis gives some concrete examples of such systems in Africa and around the world.

### **6.3 Other countries where minorities are explicitly mentioned in electoral laws**

In Burundi, another African country, Hutus who represent 85% of the population are allocated 60% of the seats in parliament (*Assemblée Nationale*) while Tutsis who represent 14% of the population are allocated the remaining 40%.<sup>142</sup> Mention of the ethnicities and the associated percentages for the *Assemblée Nationale* are explicitly mentioned in the black-letter of the Constitution itself.<sup>143</sup> In relating what the ethnic composition of the *Assemblée Nationale* should be, the Constitution also safeguards the representation of another ethnic group, the Twa, which should secure three seats by a process called 'co-optation' in accordance with the electoral code.<sup>144</sup> The Constitution even goes further to state that the government of Burundi can constitute of a maximum of 60% of Hutus and 40% of Tutsis while underscoring that the government welcomes all the different ethnicities in Burundi.<sup>145</sup> In India, the largest democracy on earth, there are reserved seats in the 'panchayats'<sup>146</sup> for 'schedules tribes and castes' expressly mentioned in the Constitution.<sup>147</sup> In Slovenia, which is a full democracy according to

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<sup>142</sup> 'Burundi Ethnic Census Raises Concern' *France 24* (21 August 2008) 1 available at <<http://www.france24.com/en/20080821-burundi-ethnic-census-raises-concern-opposition-tutsi-hutu>> (accessed on 19 August 2009), the article comments that discreet ethnic census conducted in the government is a misguided interpretation of the Constitution of Burundi.

<sup>143</sup> Constitution of the Republic of Burundi 2005, Art 164 available at <<http://www.chanrobles.com/burundi1.html>> (accessed 22 August 2009).

<sup>144</sup> As above.

<sup>145</sup> n 143, Art 129.

<sup>146</sup> Constitution of the Republic of India 1950, Sec 243(d) according to which the 'panchayats' are institutions of self-government for rural areas available at <<http://indiacode.nic.in/coiweb/fullact1.asp?tfnm=00%20279>> (accessed 20 October 2009).

<sup>147</sup> As above, Sec 243D (1) available at <<http://indiacode.nic.in/coiweb/fullact1.asp?tfnm=00%20283>> (accessed 20 October 2009).

the EIU index on democracy,<sup>148</sup> the right of Italian and Hungarian national minorities to develop cultural activities is explicitly mentioned in the Slovenian Constitution.<sup>149</sup> The Constitution also commands that one deputy of the Italian and one deputy of the Slovenian community should always be elected in parliament.<sup>150</sup> The European Commission For Democracy Through Law observed that the system for local elections in Slovenia is different in that it does not create people based constituencies, but nevertheless provides a way of guaranteeing the representation of members of the Italian minority in ethnically mixed areas.<sup>151</sup> Although on comparing Slovenia and Mauritius on the democracy index, Slovenia ranks three positions down Mauritius, the breakdown of the results show that Slovenia scores much higher in the criterion of 'political participation'<sup>152</sup> which includes representation of minorities.<sup>153</sup>

#### **6.4 Concluding remarks**

Admittedly, most national constitutions of the world do not explicitly mention communities in their black-letter, but some do, and without contestations, because each country has a unique history. When accompanied with its compelling reasons, history has so required that communities should be mentioned in a Constitution, it was actually to resolve ethnic conflicts, such was the case of the Burundi Constitution. History has its reasons which reason might not understand.

The point here is that the mere mention of a community in the Constitution does not necessarily cause discrimination albeit not being a best practice, and may not hamper on democratization.

Minority Rights Group International has concluded that there can be no standard formula for securing to participation of minorities, and that suitable solutions have to be found from within the society in question, rather than being imposed from outside.<sup>154</sup>

After all, it will be dishonest to say that the Mauritian society lives in complete oblivion of the community factor. It is trite knowledge that political parties carefully distribute tickets to

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<sup>148</sup> n 5 above.

<sup>149</sup> Constitution of the Republic of Slovenia 1991, Art 64 available at <<http://www.dz-rs.si/index.php?id=351&docid=25&showdoc=1>> (accessed 20 August 2009).

<sup>150</sup> As above, Art 80.

<sup>151</sup> European Commission of Democracy Through Law 'Electoral Law and National Minorities' (2000) 3 available at <[http://www.venice.coe.int/docs/1999/CDL-MIN\(1999\)001rev2-e.pdf](http://www.venice.coe.int/docs/1999/CDL-MIN(1999)001rev2-e.pdf)> (accessed 20 August 2009).

<sup>152</sup> n 5 above, the score of Slovenia is 6.67 out of 10 and equals that of France, Greece and Italy while Mauritius scores a meager 5.00.

<sup>153</sup> n 5 above, p 24 ; the result of the criterion 'political participation' relies partly on whether ethnic, religious and other minorities have a reasonable degree of autonomy and voice in the political process, as seen at question 28 in the methodology.

<sup>154</sup> n 47 above, p 2.

represent minorities, and hence particular communities, in constituencies where they are present. Such open community recognition is confirmed as it cannot be coincidence when all the major political parties choose the exact community combination for the three candidates in all the twenty constituencies ( for example Hindu-Hindu-General Population or Hindu-General Population-Muslim).<sup>155</sup> Secondly, openness and freedom of expression allows it that some political parties report in the press that they have lost due to communal voting.<sup>156</sup>

Finally, it is expedient to end this chapter by quoting the African Charter on Democracy, Elections and Governance<sup>157</sup> which provides that State Parties should respect ethnic, cultural and religious diversity, which contributes to strengthening democracy and citizen participation.

The view of this thesis is that the explicit mention of communities through the BLS in the Constitution does not impinge on democratization. Rather, it is a recognition by the State of the ethnic diversity of Mauritius which contributes both to democracy and citizen participation.

Having found the pros and cons of the BLS through the above chapters, this thesis may thus move forward to suggest a possible reform.

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<sup>155</sup> Electoral Commissioner's Office 'National Assembly Elections 2005' (2005) available at <<http://www.gov.mu/portal/goc/eco/file/nae2005.pdf>> (accessed 4 September 2009).

<sup>156</sup> 'Elections 2005: Le MMM discute des causes de sa défaite' *L'Express* (9 July 2005) available at <[http://www.lexpress.mu/Services/archive\\_45745\\_ÉLECTIONS-2005](http://www.lexpress.mu/Services/archive_45745_ÉLECTIONS-2005)> (accessed 25 August 2009). In the article, it was reported that the political office of the MMM highlighted that communal voting was one of the main factors which led to the fall of the MSM-MMM alliance.

<sup>157</sup> n 102 above, Art 8(3).

## **7. Recommendations and conclusion**

In light of the flaws visited in the previous chapters, this chapter will manoeuvre and contrive an amendment which can be effected to the BLS and will attempt at ridding the BLS of most of its existing criticisms while reinforcing the democratic ordain. A realist starting point will be first of all to acknowledge that there is no perfect electoral system in a similar way that there is no perfect democracy in the world. What can and should be strived for is near-perfection.

Apologies are made for the inherent complexities of the workings; however, this thesis did not want to leave the academic or election reformer reading it with a feeling of half-quenched thirst by merely detailing guidelines which should be applied in scaffolding a reform to the BLS and leaving him with the task of designing the reform.

The prospect of reform for the BLS which this thesis has crystallized is the following:

### **7.1 A foreseeable election of the eight additional seats by PR**

A proper election should be carried out for the eight additional seats, as opposed to the present allocation of seats under the BLS which as mentioned in the introduction depends on the calculations which cannot reasonably be foreseen by the voter at the time the votes are cast. Although the African Charter on Democracy, Elections and Governance does not mention it explicitly, it can be read between the lines that adherence to principles of democracy and respect for human rights<sup>158</sup> and the requirement of popular participation<sup>159</sup> entails that the electoral process should be foreseeable. The right to participate freely in government directly, or through freely chosen representatives enshrined in the African Charter<sup>160</sup> is another indication that the will of the people should trickle down through a foreseeable electoral process. It appears that the requirement to expect a foreseeable election process is so evident that drafters of international instruments relating to elections and democracy have not even deemed it relevant to include foreseeable results as one of the essential election criteria. Admittedly, the requirement that an election should be foreseeable is inherent to democracy itself and mentioning it would be metaphorically akin to the *cliché* that one would need to break an egg to make an omelet. A foreseeable election process would mean that a voter should be able to reasonably foresee on which candidate will his cast vote have a bearing. Even on the

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<sup>158</sup> n 102 above, Art 2(1).

<sup>159</sup> n 102 above, Preamble. The Resolution on Electoral Process and Participatory Governance 1996 of the African Commission also mentions government which is of the choice of the people.

<sup>160</sup> n 99 above, Art 13(1).

Alternative Vote (AV) and the Single Transferable Vote (STV) systems, voters rank the candidates in order of preference<sup>161</sup> to determine second or further preferences so that their votes are devolved according to their wish. In the BLS however, the voter cannot reasonably foresee who the 'Best Losers' will be and cannot vote for the eight additional seats as the eight seats depend on complex calculations made on the elections result as explained in the introduction.

It is thus proposed that apart from the three votes cast for the FPTP system, a separate ballot is provided for the election of the eight additional seats by a PR system. This model thus tallies with the Sachs Commission's recommendations to the extent that it acknowledges an introduction of a doze of PR<sup>162</sup> but differs in that the PR will not apply to 30 additional seats but solely to the already existing eight seats established for 'Best Losers'.

## **7.2 A separate ballot for the eight additional seats**

The voter will thus cast three votes for the FPTP and two more votes on a separate ballot: one for a political party or an independent candidate and another for a community. Only three communities will be represented: the General Population, Muslim and Sino-Mauritian as the goal of the BLS is to represent minority communities.<sup>163</sup> Communities are still being mentioned in this reform; nonetheless as detailed earlier<sup>164</sup> it is impossible to ensure adequate representation of minorities without their prior identification, albeit that it should not be encouraged. Protection through adequate representation necessarily comes with identification, and renouncing identification under the guise of nationhood would imply that minorities are now adequately represented which may certainly not be the case. This formula resolves the problem of encroachment on negative freedom of association as even independent candidates can be voted for.

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<sup>161</sup> A Reynolds 'Electoral systems and the protection and participation of minorities' (2006) 8-9 where the author makes a brilliant and concise *résumé* of the main types of electoral systems.

<sup>162</sup> n 26 above, para 56(ii).

<sup>163</sup> It can be noted here that it is only minorities who will have to disclose their communities, hence mitigating the disclosure stigma.

<sup>164</sup> See Chapter 6.



### **7.3 Two sets of results**

There will thus be two sets of results which will be the percentages of votes won by political parties or independent candidates, and the percentages of votes won by the three communities.<sup>165</sup>

### **7.4 Political party lists**

Each political party will have to submit three lists of eight candidates for each community to the Electoral Supervisory Commission on nomination day of all the candidates, that is three lists are submitted with respect to the General Population, the Muslim and the Sino-Mauritian community. The candidates of each community are ranked in order of preference according to the wishes of the political party and election will start with the highest candidate to the lowest (descending legitimacy). It shall be a rule that no more than three candidates on each list of eight can also stand for election through the FPTP. Otherwise, their double-election will hamper the results of this PR based system. All candidates going for elections under the banner of a political party will thus be absolved from disclosing his community on the nomination paper, thus eliminating the controversial debate about forced disclosures and its associated sanction of invalidation of the nomination.<sup>166</sup> However, independent candidates will still be required to disclose their community should they wish to stand for one of the eight additional seats. Should they decide not to disclose their community, it would infer that they would not be able to adequately represent the community as protection through representation of minorities comes hand in hand with identification, as mentioned before. Thus, it would simply mean that their names will not be included on the separate ballot. The impediment about whether candidates are in fact disclosing their real communities<sup>167</sup> do not constitute any problem in this arrangement as the electorate will be free to judge through this form of direct foreseeable election. Suspect party lists or suspect independent candidates' status with regards to community will not attract votes.

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<sup>165</sup> For a hypothetical example, Party X wins 30% of the votes, Party Y wins 35%, Party Z wins 37% and the rest of independents win cumulatively 3%. Then the General Population community wins 60%, the Muslim community 30% and the Sino-Mauritian community 10%.

<sup>166</sup> See Chapter 4.

<sup>167</sup> n 20 above.

### **7.5 Determination of seats**

The final step is thus to determine which seat will go to exactly which candidate. The results from each voting process that is for party or independent; and community should be multiplied with one another and multiplied again by eight which is the maximum number of seats. The result will give a quotient of the number of each community which should belong to each party or independent candidate.<sup>168</sup> Of course, the quotients will not be whole numbers and the number nearest to one should be chosen to determine the number of seats (for instance 1.44 would be taken to be 1 whilst 1.87 would be taken to be 2). Candidates are then selected from the party according to the established list in order of rank. For independent candidates, the quotient will only be their percentage of votes won directly.

### **7.6 Minor corrective**

In case the result of this simple arithmetic finds that there are still vacant seats out of eight because of a large number of small quotients,<sup>169</sup> then the vacant seats will be attributed to the highest quotient of a community which has won no seat up to this point, and further to the highest quotient of an independent candidate. This minor corrective is important and it perfects the representation of all communities and enables independent candidates to stand a chance of election as well since admittedly, their chances of election will have remained very low. They are obviously not on the exact level playing field as candidates in political parties as their percentage of votes won are not multiplied by eight to inflate their quotients but yet it is also not reduced by a multiplying it by the fraction for the community (as they would have mentioned theirs already). Hence altogether, and added to the fact that there is a minor corrective, independent candidates will stand a fair chance of being elected for a seat.

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<sup>168</sup> n 165 above, the quotient for the General Population community of Party X will thus be 30% multiplied by 60% multiplied by 8 which is equal to 1.44. The quotient for the Muslim community of Party Y will thus be 35% multiplied by 30% multiplied by 8 which is equal to 0.84.

<sup>169</sup> n 165 above, the quotient for the Sino-Mauritian community in Party X will be 0.24 which is very small.

## **7.7 Conclusion**

It is thus most appropriate to conclude by reflecting on the statement of the problem and determining the ways in which this thesis has clarified and resolved problems raised. The thesis has shown that the BLS does not per se introduce elements of communalism into the Constitution, it merely identifies communities to ensure their adequate representation and protection of minorities through adequate representation necessarily comes with identification. It has also been found that the workings of the BLS do not also cause discrimination on the basis of race. The finding on the sanction of invalidation of the nomination for non-disclosure of the community on the nomination paper would have been different should a more judicially active definition of 'democratic state' in the Mauritian Constitution be used. An amendment to the Constitution to explain in more detail the implications of the democratic society and civil and political rights will thus be most welcome. Nevertheless, the proposed reform sets aside the bulk of the problem as candidates of the majority and those in political parties will be absolved to disclose their communities. The fact that the party list will be subjected to the scrutiny of the electorate through direct elections will also ensure that there is no suspect fraudulent disclosure of the community. Another advantage of the proposed reform is that it silences the debate about the use of the archaic 1972 ethnic census figures as it is the actual suffrage at the turn-out of the elections which would count. As there is no need for a second set of seats to compensate for the advantage of government, there will never be irrational results in relation to the model. The eight seats returned through direct elections may even have a bearing on government but then all the parties will have equal chances of participation to the seats should they represent minority candidates. The proposed system is also based on direct participatory and representative democracy with outcomes that the voter can reasonably foresee. The elected candidates will also not be tied down to one constituency as unwanted candidates who have failed the FPTP and their party can re-allocate them in another constituency lacking representation. Independent candidates may be re-allocated, if they wish, in consultation with the Electoral Supervisory Commission. The issue of whether they are unwanted will also less likely arise as they would have been elected by direct election. Finally, the inherent simplicity of this model also allows more minorities to be included in the PR list, should it be decided that there are more. Democracy in Africa will not be achieved in one day. There is also no perfect democracy or electoral system under the sky. Nonetheless, I am confident that the contribution of this thesis will elevate democracy in Mauritius and Africa one step closer to near-perfection.

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