

Report Of The Commission On Constitutional And Electoral Reform

2001/02

Introduction

1. In a society as lively and politically literate as Mauritius, it is not surprising that the Commission for Constitutional and Electoral Reform¹ should be inundated with submissions². Over a period of several weeks we received more than seventy written memoranda and heard oral representations during more than fifty sessions. We also organised three public sessions in Mauritius and one in Rodrigues. The task of sifting through the great mass of material was considerably assisted by the fact that, whether they came from organised political parties, cultural groups or concerned individuals, the depositions were forceful and articulate. We would like to express our appreciation to all the many persons, both exalted and humble, who contributed information, ideas and perspectives. In equal measure, we thank the Mauritian support team, whose outstanding logistical and administrative backup enabled us to handle this vast mass of material with great expedition.

2. If the volume of material was not unexpected, what was surprising, given the robust nature of political life in Mauritius, was the relatively high degree of consensus on the need for change in a number of key areas. Thus, virtually all the deponents accepted the idea that steps should be taken to strengthen guarantees of free and fair elections, particularly with regard to speed, security, finance and the need for an extensive code of conduct monitored by a strong and independent electoral supervisory body. There was also widespread acceptance of the necessity to correct the gross under-representation of opposition parties produced by the electoral system. Furthermore, all those who testified on the Judiciary were at one on the importance of establishing a distinctive appellate structure for the Supreme Court.

3. Although consensus on the need for reform in defined areas did not necessarily extend to agreement on possible solutions, it did assist us considerably in delimiting our tasks. The Commission was accordingly not called upon to examine the constitutional structure of Mauritius as a whole, but simply to make recommendations for reform in a number of particularised areas. Although there were some well articulated submissions arguing for radical constitutional and social changes, the overwhelming opinion was that in

¹ See Annexure A

² See Annexure B

general, the Constitution has worked well and that democracy has been well implanted in Mauritius. Nothing we heard or saw gave us reason to doubt that by international standards Mauritius rates highly as a democratic country. The outcomes of elections are respected. Political leaders step down from office if the electors turn against them. As one deponent put it, Mauritius is not dependent on international observers to guarantee the fairness of its elections, it sends observers to other places. Our function, accordingly, was a limited one, namely, to examine certain deficiencies that had emerged in the course of three decades of independence, and to propose appropriate solutions.

4. It is to the credit of the Government and the Mauritian society that it is willing to engage in such a process of constitutional self-examination. However well the institutions of democracy may be seen to be functioning, they need constantly to be adjusted. What is fundamental is that the debate on constitutional questions itself be free and fair, and that there be as much public engagement in the process as possible. In that respect, we regard the proposals which follow as marking the starting rather than the end-point of a debate on how best to upgrade the Mauritian Constitution and electoral process.

5. The Commission proposes, Government disposes. The Government has at all stages been exemplary in supporting the Commission and respecting our independence. The Opposition has equally been exemplary in the manner in which it has engaged with us, contributing helpful information and insights and also acknowledging our independence. Given the high degree of political literacy in Mauritius, we have no doubt that the conditions will be there for a serious national debate, both inside and outside Parliament, on constitutional and electoral reform. In this respect, the media will have a vital role to play in clarifying the issues and encouraging public debate. At the end of the day, it will be for Parliament to decide in terms of the procedures established by the present Constitution, as to how, if at all, the Constitution should be amended. Informed public debate can do much to assist Parliament in making the right decisions.

6. While at all times striving to maintain analytical rigour, we have not written our report as a highly technical and impenetrable document to be studied only by experts, but rather as a publication intended to be accessible to all. In this regard it is to be hoped that in facilitating public involvement, this report be translated so as to make it understandable for the whole population.

7. The Government has the special responsibility of stewarding the process, and the Opposition the important task of making its contribution to the debate. Ultimately, however,

it is the nation which has to live under and agree to be bound by the terms and values of the Constitution, and it is the nation to whom the Constitution belongs. It is in this spirit and with appreciation for the manner in which his Office has facilitated our work without compromising our independence, that we hand over this Report to the Prime Minister.

Interpreting the Terms of Reference

8. The terms of reference read as follows:-

- "(a) review the role of the Electoral Supervisory Commission and make recommendations on how it can be strengthened and its responsibilities extended to uphold the democratic fundamentals of the Mauritian society in particular to ensure really free and fair elections;*
- (b) review all practical aspects relating to the holding of elections and make recommendations for greater transparency and for securing a level playing field for competing parties;*
- (c) propose a draft Public Funding of Political Parties Bill;*
- (d) make proposals regarding amendments to be made to the Constitution of Mauritius so as to consolidate and strengthen the democratic system, including additional powers to be given to the President of the Republic, in the light of the constitutional experience of the Republic of India;*
- (e) make proposals regarding representation in Parliament on a proportional basis within the existing electoral system;*
- (f) make proposals for the prohibition of communal or religious political parties;*
- (g) review the composition of the Judicial and Legal Service Commission;*
- (h) separate the Appellate Division of the Supreme Court from other divisions;
and;*

(i) *report on any matters that are incidental or conducive to the attainment of the above objectives”.*

9. These terms of reference and the status of the Commission have to be understood in the context in which the terms were drafted and the Commission set up. The terms had their origin in a campaign commitment made by the alliance which won the elections of 2000. The alliance electoral manifesto stated that there existed today a widespread consensus in public opinion as well as in the main political parties that it was a matter of urgency to reform the election system so that it included some form of proportional representation. The manifesto also stated that the alliance Government would take guidance from the Constitution of India to propose constitutional amendments to enable the President to exercise certain additional powers, particularly in relation to the dissolution of the National Assembly. The alliance emphasised that in opting for a Presidency based on the Indian model, it reiterated its adherence to the Westminster style of government with the Prime Minister as the head of the executive. These election commitments explain why the Commission was set up. Although serving as a trigger for establishing the Commission, they do not, however, convey the full scope of the work of the Commission, nor do they indicate its independent character.

10. In technical terms, the Government had the power to amend the Constitution without setting up the Commission. Because it enjoyed well over the 75% majority required to amend the Constitution, the Government could merely have requested its legal advisers to prepare the necessary draft legislation. Instead, with the support of the Commonwealth Secretariat and the willingness of the Indian Government to release one of its Election Commissioners whose participation had been requested by the Mauritian Government, it established the Commission as an independent body. It then invited the Commission both to investigate the proposals made in the electoral manifesto as well as to enquire into a number of additional issues, and to make appropriate recommendations. The function of the Commission is accordingly not to dot the i's and cross the t's of the policies declared in the manifesto, but rather to make an independent assessment of all the issues raised.

11. In broad terms, the Commission's role is, within the framework established by the terms of reference, to help consolidate and advance constitutional democracy in Mauritius. In preparing this report, the Commission has been guided by the following principles -

(i) the Commission is independent and is called upon to conduct its activities and to make its views known without fear or favour;

- (ii) its mandate is not to propose a radical overhaul of the constitutional structure of Mauritius but rather to deal with a number of specific deficiencies which have emerged in practice and require correction;
- (iii) the Commission will pay due regard to the rich Mauritian experience of how to consolidate democracy in a multi-ethnic and multi-faith society, and will be sensitive to what has been called the Mauritian way of doing things, without ignoring the problems and contradictions that have arisen;
- (iv) the Commission will also pay due regard to international experience, particularly in countries such as India, South Africa, the United Kingdom and France as well as in Africa generally, without attempting to impose any particular model in Mauritius.

13. It will be seen that eight specific matters and one general theme have been included in the terms of reference. The logic of our report has made it convenient to re-arrange the sequence of the terms of reference and to cluster them into the four Chapters that follow. Chapter One will deal with proposed changes to the character of Parliamentary democracy in Mauritius, and focus particularly on the powers of the President and the need to introduce a measure of proportionality into election outcomes. Chapter Two will be concerned with further levelling the playing field for elections and strengthening the capacity of those responsible for ensuring that the rules for free and fair elections are fully respected. Chapter Three will relate to the funding and registration of political parties. Chapter Four will cover proposals to change the composition of the Judicial and Legal Service Commission and to separate the Appellate Division of the Supreme Court.

CHAPTER ONE

PROPOSED AMENDMENTS TO THE CHARACTER OF PARLIAMENTARY DEMOCRACY

14. Item (d) of the terms of reference invites the Commission to

"make proposals regarding amendments to be made to the Constitution of Mauritius so as to consolidate and strengthen the democratic system, including additional powers to be given to the President of the Republic, in the light of the constitutional experience of the Republic of India".

A small number of submissions received proposed a radical extension of Presidential power and some recommended that the President be elected via direct suffrage. The great majority of the many submissions received on this aspect, however, supported the present system in terms of which the Prime Minister, directly accountable to Parliament, is the dominant figure in Government. We do not believe that our terms of reference permit us to entertain a sweeping shift from a Prime Ministerial to a Presidential form of government. Nor do we feel that any substantial case has been made out for such a major restructuring of the form of government. We do feel, however, that even if no great changes are called for in terms of the powers of the President vis-à-vis government, there is a need to enhance the role and status of the President as an independent figure protecting the institutions of democracy and representing the nation as a whole. We will make recommendations in this regard.

15. Before doing so, however, we will consider the two specific proposals concerning the powers of the President that were made to us. The first, and more important one, concerns the power of the President to dissolve Parliament. The second deals with the power of the President to exercise the prerogative of mercy. After dealing with these two matters we will consider the general question of the role, status and function of the President in Mauritian society.

Power of the President in relation to the dissolution of Parliament

16. The terms of reference specifically invite us to make proposals for giving additional powers to the President, in the light of the constitutional experience of India. The Constitution of Mauritius at present provides that the President is bound to follow the advice of the Prime Minister as to dissolution of Parliament³. The position in India, which has evolved during the fifty years of operation of the Constitution, is as follows: if the Prime

Minister loses a vote of confidence on the floor of the lower House of the Parliament and consequently loses his or her majority, and if when resigning, he or she also recommends dissolution of the lower House, the President is not bound to accept such advice. Under such circumstances, the President could explore the possibility of an alternate government being formed. Thus, the President can investigate the possibility of the Leader of the Opposition or of an alliance commanding a majority in the House becoming Prime Minister. Should it turn out that an alternative government with the confidence of the House cannot be formed within a reasonably short period, the President will accept the advice of the outgoing Prime Minister and dissolve the House.

17. Strong arguments were advanced both for and against the introduction of the Indian practice into Mauritius. The main contention in support of the change was that once the Prime Minister has lost the support of the House, he or she has forfeited the right to make a binding recommendation that Parliament be dissolved. Accordingly, it was said, the President should in those limited circumstances have the opportunity of exploring the possibility of finding an alternative person to serve as Prime Minister; democracy would be advanced by ensuring that the will of the people is respected through their elected representatives. The contrary view was to the effect that the proposed amendment would create two great and unacceptable risks. The first was that the President would lose his or her status as an independent figure and become embroiled in party political disputes over the making and breaking of governments. The second is that parties will be encouraged to fragment and to break alliances, thereby introducing an undue level of instability.

18. If one steps back from the wording of the proposals and looks at their implications, it seems that although constitutionally minimal in its operation, the adoption of the Indian practice would have the political effect of limiting the powers of the Prime Minister in one significant respect, namely, it would reduce the discipline over the Members of Parliament which the Prime Minister is able to exercise through threatening to dissolve Parliament and have fresh elections. The introduction of the Indian practice would accordingly enhance the role of the President in the background and reduce the power of the Prime Minister to threaten to dissolve Parliament if his or her supporters do not toe the line.

19. In general terms, we believe that, on balance and subject to important qualifications which we will mention below, the proposed change is in the interests of democracy. It allows for account to be taken of shifts in public and party opinion and prevents democracy from being undermined either by the holding of too frequent elections, or by the undue use of an

³ See Annexure C

inflexible Prime Minister of the threat to call early elections. We qualify our support for the adoption of the Indian experience in two important respects, however. The first is that Indian experience should be followed not only in relation to the limited but important area of discretion given to the President, but also in respect of anti-defection measures. One of the main arguments in favour of upholding the authority of an authoritative and powerful Prime Minister is that this discourages corrupt practices and behind-the-scenes wheeling and dealing to constitute a new government. Hence the need for anti-defection measures if the power of the Prime Minister is diluted in any way⁴. The second qualification is that, as in India, the President has to act within a culture of restraint. It would accordingly be of the utmost importance for any President exercising the new powers to do so in a manner which manifestly displays his or her impartiality and lack of engagement in the internal affairs of the House or of the parties. Such restraint would also be in keeping with Indian experience, where a good President is regarded as one who does not intervene in the political game, but who is there to act in the interest of democracy and of the country should a clearly established crisis of confidence emerge in the Lower House.

20. In the end, it would be a matter of political judgment for those considering amendments to the Constitution as to how serious any possible risks to democracy may be of the proposed amendment and how confident they can be that the qualifications we propose will reduce such risks to acceptable levels. On the evidence before us, however, and taking into account the positive Indian experience in this regard, we repeat that we believe that on balance and subject to the two qualifications above, it is in the interests of democracy that the President in Mauritius be granted this additional discretionary power.

21. The Constitution at present obliges the President to dissolve Parliament if the Prime Minister so requests, even if the Prime Minister has lost majority support in Parliament and there is another person capable of forming a government that enjoys majority support. The proposed change will in no way limit the power of a Prime Minister who enjoys the confidence of the House to oblige the President to dissolve Parliament and call fresh elections. Nor will it enable the President on his or her own initiative to decide that Parliament should be dissolved. Its effect is to limit the Prime Minister's power only in circumstances where the Prime Minister has ceased to enjoy the confidence of Parliament, and a reasonable prospect exists that someone else having majority support could be appointed in his or her stead.

⁴ The Indian Constitution was amended in 1985 to disqualify Members of Parliament who vote or abstain against the direction of their party authorities. The disqualifications do not apply if a third of the party members split or if the party merges with another party. [Articles 182(2) and 191(2)]. The full text of the Anti-Defection provision as provided for in the Fourth Schedule to the Indian Constitution is contained in **Annexure C**.

Subject to the cautions expressed above, we accordingly recommend that Section 57(1) (a) be amended to read as follows:

“The President, acting in accordance with the advice of the Prime Minister, may at any time prorogue or dissolve Parliament:

Provided that –

where the Assembly passes a resolution that it has no confidence in the Government and the Prime Minister does not within 3 days either resign from his office or advise the President to dissolve Parliament within 7 days or at such later time as the President, acting in his own deliberate judgment, may consider reasonable, the President, acting in his own deliberate judgment, may dissolve Parliament”, *save that where the President has reason to believe that some other person is capable of forming a government with the confidence of a majority in the Assembly, he or she may decline the request of the Prime Minister and invite such other person to form a government.*

Prerogative of Mercy

22. In terms of Section 75 of the Constitution, the President is empowered to exercise a prerogative of mercy in respect of persons convicted of any offence. The President is advised by a Commission on the Prerogative of Mercy consisting of a chairperson and not less than two other members, all appointed by the President, acting in his or her deliberate judgment. The President is obliged to act in accordance with the advice of the Commission. We were informed that the absence of an independent decision-making power on the part of the President could give rise to unfortunate situations where the President disagrees with the advice received from the Commission. We feel, however, that given the sensitive nature of the issues involved and the importance of the President being to represent the whole nation without fear or favour, and bearing in mind that the Members of the Commission are persons appointed by the President presumably on the basis of his or her confidence in them, the present situation be retained. The President should nevertheless be able publicly to indicate his or her disquiet over the recommendation by being able to refer such recommendation back to the Commission for reconsideration. We accordingly recommend that Section 75 (4) be amended by the addition of the words in italics.

“(4) In the exercise of the powers conferred upon him by subsection (1), the President shall act in accordance with the advice of the Commission”, *save that if the President has reservations about any advice given by the Commission, he or she may*

return the matter for reconsideration, but if the advice is submitted anew with or without amendment, the President shall act upon it".

The role, status and function of the President

23. The Constitution makes it clear that although the President shall be head of state, it is the Prime Minister who is to be the head of government. Given this clear division of responsibilities, we feel it important that the President should not be seen to be embroiled in any way in the affairs of government or in party politics. The only moment of discretionary intervention would be when the Prime Minister loses the support of the House and an alternative person to take over may be found. With this limited exception, the President should act and be seen to be acting in a manner that does not favour any political group or tendency. We do not propose any change in this respect. On the contrary, any new power the President may have will have to be exercised with utmost discretion and impartiality.

24. At the same time, we believe that the President has a special constitutional role to fill, and that such role should be spelt out in clear and affirmative language. In particular, the Constitution should declare that it is the responsibility of the President to guard the interests of the nation as a whole, and to ensure respect for the Constitution, the institutions of democracy, the rule of law and fundamental rights, and to strengthen the unity of the diverse Mauritian nation.

25. At the moment, the Constitution simply deals with the manner of appointment and removal of the President and states how the President's power is to be exercised. The specific powers of the President, relating to such matters as assent to legislation and appointment of officials, are scattered throughout the Constitution. There is a controlling provision which indicates that the President acts on the advice of the Prime Minister or a Member of the Cabinet, or after consultation with such persons or in his or her own deliberate judgment, as the Constitution indicates on a case by case basis. This provision consolidates the principle of responsible government and we do not propose any change to it. There is no general provision, however, that sets out the role, status and function of the President. We believe that it is in the interests of democracy that there should be one.

26. Our proposals to achieve this are made within the framework that Mauritius will continue to have a Prime Ministerial rather than a Presidential form of government. Policy decisions and matters concerning the implementation of governmental policy will continue to be the responsibility of government headed by the Prime Minister and a Cabinet. Nevertheless, we feel that the President should have a particular responsibility for ensuring

that the institutions of democracy function in a manner consistent with the Constitution. This is particularly important with regard to elections, so that the legitimacy of the government should be beyond doubt, and in relation to the Judiciary, so that the constitutionality of all governmental actions can be appropriately safeguarded.

27. We accordingly make a number of recommendations aimed at strengthening the role of the President as the symbolical head of the overall constitutional and democratic structure, without disturbing the principle that it is the responsibility of the government, headed by the Prime Minister, to govern, and not that of the President. It will be seen that some of the recommendations which follow deal in general terms with the role, status and functions of the President, while others focus on his or her particular powers of appointment. We deal first with the general recommendations.

28. Chapter IV of the Constitution dealing with the President and the Vice-President of the Republic of Mauritius should in our view be amplified so as to spell out in affirmative terms the overall role, status and functions of the President. It should emphasise that in fulfilling the functions assigned to him or her by the Constitution or any other law, the President shall act in the interests of all the people of Mauritius, without favour or prejudice; that the President shall defend the Constitution and ensure that the institutions of democracy, the rule of law, the fundamental rights of all and the unity of the diverse Mauritian nation are protected. We accordingly recommend that Section 28 be amended by the insertion of a new provision which for convenience we refer to Section 28(1)A -

Section 28(1)(i) – The President shall defend the Constitution and ensure that the institutions of democracy and the rule of law are protected, that the fundamental rights of all are respected and that the unity of the diverse Mauritian nation is maintained and strengthened.

Section 28(1)(ii) – In fulfilling functions entrusted to him or her by the Constitution or any other law, the President shall act according to the principles in the above paragraph and subject to the provisions of Section 64.

29. We also recommend that the oath of the President as contained in the Third Schedule to the Constitution be amended so as to replace the present oath with the following:-

"I do swear (or solemnly affirm) that I will faithfully execute the office of President and will, to the best of my ability without favour or prejudice, defend the Constitution and the institutions of democracy and the rule of law, ensure that the fundamental rights of all are protected and the unity of the diverse Mauritian nation maintained and strengthened".

30. In keeping with the above approach, we shall at a later stage in this report indicate areas where we feel the President should have enhanced powers of appointment in respect of officials responsible for ensuring that elections are free and fair and in respect of the Judiciary. The common theme is to enhance public confidence in the independence of these bodies. This can be achieved by entrusting the appointment to the President, whose function it is to look at the interests of the nation as a whole. The President will, after appropriate consultation, direct a mind free of party political considerations to make appointments to institutions designed by the Constitution to preserve democracy and the rule of law. Our specific recommendations would be spelt out in Chapter Two dealing with elections and Chapter Four that concerns the Judiciary. We mention in advance that they relate to the appointment of the Chairperson and Members of the Electoral Supervisory and Boundaries Commission and the Electoral Commissioner, as well as to the appointment of Judges of the proposed new Appeal Division of the Supreme Court, the Judges of the High Court Division of the Supreme Court and also to the appointment of the Solicitor-General and the Director of Public Prosecutions as well as Members of the Judicial and Legal Service Commission.

The Vice-President

31. If the Constitution at present is laconic in relation to the function of the President it is even more so in connection with the function of the Vice-President. A number of deponents indicated that they regarded the Vice-Presidency as an otiose office that served no useful function. The Vice-President himself seemed to share this view. He stated that his only constitutional function was to stand-in for the President when the President was absent. This function, he said, could adequately be filled by some other official, such as the Speaker of the House. The question of abolition of the post of Vice-President does not fall squarely within our terms of reference and we make no pronouncement on it, save to observe that consideration should be given either to enlarging the constitutional role of the Vice-President so as to enable the President to function more effectively, or else to abolishing the position altogether.

Introducing a measure of proportional representation in the electoral system

Item (e) – *"make proposals regarding representation in Parliament on a proportional basis within the existing electoral system"*

32. Mauritius has developed an electoral system with two unique features. The first is the division of the country into constituencies in which each voter has to vote for three candidates, the three candidates getting the most votes being elected. The second is what has become known as the Best Loser System (BLS). Both these aspects resulted from intense political struggles and negotiations in the period leading up to the adoption of the Independence Constitution. Virtually all the deponents were of the view that in general electoral system had worked well, and that save for one period early on elections had been held regularly and their outcomes respected. From that point of view, democracy is alive and well and no major overhaul of the system is required. We will deal later with criticisms directed at the BLS.

33. At the same time there was unanimity that the first past the post (FPTP) system in the three-member constituencies frequently produced results which were grossly disproportionate to the share of votes obtained by the different parties. At times, although obtaining a substantial vote, the Opposition was either completely or nearly completely eliminated. Thus, in 1982 and in 1995 the result was 60-0, while in 1991 and the year 2000 the presence of the Opposition barely reached symbolical levels. The purpose of introducing proportionality into the system was accordingly to correct the inordinate imbalances created by FPTP and only marginally compensated for by the Best Loser System (to be discussed below).

34. Annexed to the terms of reference was a document entitled "Brief on Proportional Representation". It reads as follows -

"BRIEF ON PROPORTIONAL REPRESENTATION

A political party or party alliance which has nominated one or more candidates in a general election and has polled in respect of the candidates in aggregate 10% or more of the total number of votes cast at the general election shall be allocated a proportionally elected member for each 5% of the votes polled.

For the purposes of this exercise, the Electoral Supervisory Commission shall determine:

whether a political party or party alliance shall be allocated any proportionately elected member of the National Assembly; and

(b) if so, the number of proportionately elected members.

As soon as is practicable after all the returns have been made of persons elected at any general election as members to represent constituencies and after the eight additional seats provided for in the First Schedule to the Constitution have been allocated, the Electoral Supervisory Commission shall allocate to each party or party alliance having polled in aggregate 10% or more of the total number of votes cast at the election one additional seat for each 5% of the votes polled by that party or party alliance.

The additional seats referred to above shall be allocated to the most successful unreturned candidate, if any, who is a member of the party or party alliance to which such seats have been allocated.

Provided that where no unreturned candidate of the appropriate party or party alliance is available, the seat shall be allocated to such person as may be designated by the leader of the party with no available candidate”.

35. It emerged that this particular brief was based on a document prepared by the MMM. When we met with the Deputy Prime Minister, we asked if this document was intended to be regarded as an obligatory feature of the terms of reference or to be treated simply as an example of how a measure of proportionality could be introduced. The Deputy Prime Minister made it clear that as far as he and the government were concerned, the brief should be treated as illustrative and not as prescriptive. This in fact coincided with the manner in which the Commission viewed its function, namely, to serve as an independent body recommending proposals on a principled and objective basis for improving the Constitution, rather than simply functioning as a technical body putting positions already prescribed by the government into legislative form. The Deputy Prime Minister in fact went on to emphasise that as he saw it our role was to propose the system which would best compensate for the gross under-representation of Opposition parties produced by the present system, taking into account the realities of Mauritius and building on what had already been achieved.

Five proposals to correct electoral imbalance

36. A great variety of electoral schemes were proposed to us. Allowing for the fact that many overlapped, we were able to distill five major models. Each had advantages and disadvantages; there was no proposal that could be said manifestly to meet all needs without any drawbacks. It became important therefore to establish the criteria we would use in evaluating each proposal. Political scientists differ as to what they regard as the characteristics of the ideal electoral system. All give considerable weight to fairness of outcome, effective government, voter choice and accountability of those elected. Most emphasise the importance of having strong parties that are broadly rather than narrowly based, and virtually all underline the need for opposition groups to be ensured a meaningful role in the legislature. Many highlight the need to secure amongst all the diverse groups in society, particularly those who regard themselves as vulnerable or marginalised, a sense that their concerns will be given proper consideration. Clearly, all the above factors would be relevant to our enquiry. Our task, however, was not to design an electoral system that would be theoretically ideal for Mauritius. What we had to do was to use the existing electoral system as a starting-point, and propose reforms that could help to remedy the particular defects and incongruities that had emerged. Accordingly, the questions we asked ourselves when making our recommendations were the following:

How can a greater degree of fairness be introduced so as to avoid a 60-0 result such as was the case in 1982 and 1995?

In correcting the over-representation of the leading party or alliance, how could we nevertheless take account of the need to secure effective government?

How could the new proposals be grafted on to what already exists so that they would not be unduly strange and disturbing to the electorate, while securing broad acceptance because of responding to manifest defects in the present system?

How could the system be devised so as to be easy to operate and simple to understand?

Finally, what would the likely social and political impact of the innovation be on the unity of the diverse Mauritian nation and on access of all to public political activity?

Reduced to their essentials, the criteria which we had to take account of were: fairness, stability, simplicity, familiarity and impact on national harmony and social progress. These factors, if taken individually, could operate in tension with each other. Thus, maximum fairness of outcome could be achieved at the expense of loss of stability. Our task accordingly was to give appropriate weight to each factor and attempt to harmonise all so as to produce the best overall balance.

37. We will refer to the proposal contained in the brief as PR Model A. PR Model A has the merit of opening the debate on proportionality, being easy to implement and guaranteeing continuation of the stability offered by the present system. According to its critics, however, it suffers from the grave defect that it would hardly touch on the disproportionality emanating from the present system. Thus, calculations made available on our request by the Electoral Commissioner indicated that under the existing system, the MSM/MMM alliance received 52.3% of the votes and 82.6% of the seats in the most recent elections. After application of the PR Model A formula, extended to a maximum of 30 extra seats, they would still receive 76.04% of the seats. The Opposition PTR/PMXD alliance with 36.95% of the votes would move up from 11.43% of the seats to 19.79%. (If only a maximum of 20 seats are added, the disproportionality would be even greater). The significance of the figure for the Opposition is that it is substantially below 25% and accordingly would fail to provide the Opposition with sufficient votes to block constitutional amendments. The point of requiring a 75% majority for important constitutional amendments is that such an elevated vote is presumed to manifest a high degree of national consensus. The objective is not to place undue hurdles in the way of constitutional reform but to encourage the degree of give-and-take that leads to national consensus. Constitutional changes thereby emerge with a high degree of legitimacy. This is particularly important when certain sections of the community see themselves for historical and other reasons as having a special allegiance to particular parties. If opinions of such parties can easily be ignored, there is a danger that members of those communities will imagine themselves as having been marginalised. As a matter of constitutional principle, a big question mark must accordingly be put against any electoral system which perpetuates a situation in which a party supported by substantially less than three-quarters of the electorate, possibly even less than half the voters, can push a constitutional amendment through in the same way as it steers any ordinary law through Parliament. There is a qualitative difference between a law altering the nature of the electoral system in dealing with fundamental rights, and one raising or lowering the level of sales tax. Critics of PR Model A claim that the way Parliament is to be constituted should take cognizance of this fact.

38. A second proposal, which we shall refer to as PR Model B, is aimed primarily at ensuring that the measure of proportionality to be introduced will be sufficient to guarantee that opposition parties receiving substantial support will get at least 25% of the seats. It is accordingly focussed on correcting under-representation of the Opposition without challenging the undisputed right to form the government of the party or alliance that gains a majority under the FPTP system. Thus, such an opposition party or parties would be entitled to supplement their seats in the House with candidates whose names appear on what will be a party PR list published in advance of the elections. On the basis of the year 2000 elections, the PTR/PMXD alliance would, applying PR Model B, get an extra 13 seats to give it a total of 21 seats in an Assembly of 83 (if no account is taken of the BLS). This figure could be adjusted if the BLS is retained so as to ensure that it would be sufficient, if necessary, to block a constitutional amendment. At the same time, it would leave intact the right to form the government of the party or alliance that gets more than, or close to, half the seats, if FPTP plus the Best Loser System are applied. The disadvantage of the system is the artificial limit which it places on the degree to which disproportionality can be corrected, and the fact that it would be relatively difficult to explain and apply. By favouring the Opposition only, it also fails to secure the advantages, to be mentioned below, which PR could in some measure offer the ruling party as well as the Opposition.

39. The third proposal, which we refer to as PR Model C, would allow for a greater degree of fairness whilst still heavily favouring stability. This model would lean in favour of stability by ensuring that the number of PR seats was limited to a figure not exceeding 30. Whether or not the BLS is retained, the fact that there will be sixty-two members elected on a constituency basis and only a maximum of thirty elected according to the compensatory PR system, will load the House heavily on the side of the constituency form of representation. The exaggerated strength of the leading party produced by the FPTP will further emphasise the relative strength in the House of such party. Thus, any party or alliance which gets close to 50% or more of the votes will be assured of such a substantial number of constituency seats that its right to form a government could not be threatened by the introduction of thirty PR seats. In the elections of 2000, the MSM/MMM alliance got 58 out of 70 seats. If, the PR Model C had been applied and the additional number of PR seats was 20, the alliance would have ended up with a majority that could still have been more than 70%. If 30 PR seats had been added, it would have ended up with a majority of nearly 60%. Thus, while strongly geared towards protecting the right to form a government of the leader of a party that on its own gets close to 50% of the national vote, or a pre-election alliance that leads with even a low percentage, it would introduce a relatively significant correction to the present gross

under-representation of the opposition party or parties. It should be noted, however, that even if PR Model C would not put at risk a party or alliance that received nearly half the votes cast, it could make a difference if no single party or alliance received close to 50% or more of the votes. In such narrow circumstances, it could, if three parties each got more than 10% of the vote, place the third party in a position to form a post-electoral alliance with a second party so as to form a majority in the House and thereby choose the Prime Minister. At this stage, one can only speculate on how any system of PR would affect electoral and party behaviour. The practical effect of PR Model C might well be to encourage the creation of post-election coalitions rather than pre-election alliances. At the moment, the electoral system gives enormous, and many say, disproportionate, incentives to form pre-election alliances. Some voters might see this as having the advantage of establishing a balanced ticket known to the electorate in advance. The parties and the electorate generally, however, might prefer the extra degree of fluidity and voter-choice which PR Model C would introduce.

40. The fourth possible approach, which we will refer to as PR Model D, would secure complete fairness in representation but at the price of stability and familiarity. It would go beyond introducing a measure of proportionality to compensate in part for under-representation of parties, and call for a more or less complete correspondence between the will of the people as expressed on a national basis, and the extent of representation in the House. Applied in its most simple form, there would be sufficient extra seats available for candidates on PR lists to ensure that a party with 52% of the vote ended up with 52% of the seats, while a party that received 37% of the votes would end up with 37% of the seats. One way to achieve this would be to double the size of the Assembly and to top up the representation of under-represented parties by selecting sufficient numbers of persons from lists provided by such parties to enable them to reach the requisite percentage of seats out of 140. Thus the PTR/PMXD Opposition would end up with approximately 37% of 140 seats, according to our rough calculations. This would entitle them to place in Parliament the first 50 people on the party list to give a total of 58 members. The MSM/MMM alliance on the other hand would be entitled to 52.3% of 140 seats. This would give them the right to place in Parliament the first 15 persons on their list to reach a total of 73. (NOTE: Because of the votes given to parties that do not reach the threshold, the total number of members would be 173 + 58, which is nine short of the total of 140). This model has the advantage of ensuring accurate and fair representation of the will of the electorate. It has additional benefits arising from the representativity and balance in terms of gender and other factors which the list system can facilitate. It would also not affect the right of a party or alliance which won 50% of the votes to form a government. It has the disadvantage, however, of appearing radically

to alter the FPTP system, which is well known to the voting public. It would also add considerably to the size of Parliament, putting pressure on accommodation and the budget.

41. Fairly late in the day, starting with a proposal made to us when we visited Rodrigues, a fifth model made an appearance. We shall refer to it as Model E. It came in different variants, but the common theme was to compensate for the under-representation of opposition parties by ensuring that one more candidate would be chosen for each constituency than the number of votes each elector had. Thus, if each voter was obliged to vote for three candidates, the candidate coming fourth would be elected. If each voter was required to vote for two candidates, then the candidate coming third would be elected. Some deponents qualified Model E by establishing maximum and minimum limits to the degree of correction to be applied. It was accordingly proposed that the Model E principle operate to establish that the leading party or alliance would end up with a maximum of 75% of the seats and a minimum of 60%. The obvious advantage of Model E is that it would be based fairly and squarely on the present system requiring attention only to the method of calculating the winners. The candidates would all have run for office, and in terms of voter support could be better Best Losers than the community-identified Best Losers of the present BLS. One criticism, however, is that all of the additional members will be seen to have run for Parliament and lost. The advantages of flexibility of the list system would also be lost. Thus, the list system could ensure a balanced ticket guaranteeing seats for the top party leaders, contributing towards gender representivity and enabling persons with skills and experience to enter Parliament without going through bruising fights at the hustings. The list system could also be developed in such a way as to allow the community re-assurances provided by the BLS to be subsumed into the new electoral arrangement, while the many drawbacks of BLS were discarded. Finally, critics of Model E drew our attention to its capacity to impact negatively on inner-party relationship and to produce results which could intensify rather than reduce communal tensions.

42. Before making our recommendations, we note that with very few exceptions, the deponents supported the idea of 10% **threshold** for parties claiming seats under PR. This was to preserve the system of strong, broadly-representative parties, and to prevent the emergence of a multitude of communally-based or single-issue parties which would fragment the nation and promote governmental instability. The only exceptions were, understandably, representatives of small parties who felt that the 10% threshold was too high, effectively eliminating them from independent representation in the Assembly. There can be no doubt that small parties frequently make a contribution to democracy out of proportion to their size. Not only are they the authors of fresh ideas, they tend to keep the major parties on their

toes. In addition, the submissions which we received showed that there are small parties which straddle the communal and religious divide on the basis of common political objectives. Their independent voices have a great deal to contribute towards political vitality on the country. Any justification for making it difficult for them to enter Parliament would have to be compelling. We believe, however, that the dangers of political fragmentation on communal or religious lines do provide powerful justification. We were informed by many deponents that communal and religious factors already play a major role in the life of all the major political parties. Even if one accepts that this is so, there can be no doubt that the present electoral system encourages parties to present balanced tickets that transcend communal and religious divisions. The testimony we received also made it clear that for most of the deponents, even those arguing a case for particular cultural or religious groups, the fact of participating in shared nationhood was a source of great pride. The authors of the Independence Constitution were at pains to construct an electoral system that would discourage overt communalism in political life. Although many problems undoubtedly remain and in spite of the fact that with the decline of political conflict over ideology, identity politics in Mauritius, as throughout the world, have become increasingly insistent, there can be no doubt that the Mauritian constitutional endeavour has achieved extraordinary success. It would seem inappropriate to introduce measures at this stage which increased rather than decreased the likelihood of the formation of single issue, communally-or-religiously based parties. In any event, parties which contribute independent ideas should be free to function even if not represented in Parliament.

43. It is convenient at this stage to say a few words about **PR lists**. International experience suggests that just about half the major democracies, mostly those that were once colonised by Britain, use FPTP while the other half use one variant or another of PR, sometimes in conjunction with a constituency system. In fact, one can note increasing support in recent years for seeking to combine the advantages of having both constituencies and PR lists. Thus, although the founding democratic Constitution for South Africa opted purely for PR at national and provincial levels, today attempts are being made to introduce significant elements of constituency representation. This is exactly the reverse of the position in Mauritius, where we are called upon to explore ways of introducing a measure of PR into what is basically an FPTP system. The advantages of PR go beyond simply ensuring proportionality between the final tally of seats and the share of votes obtained. The list is normally established and published in advance. It ranks the candidates in order of preference so that those high on the list stand a better chance than those low down. The list can be composed in such a way as to present the best face of the party. In South Africa, the ANC adopted an internal statute which required that at least three out of every bloc of ten

candidates had to be women. This had a major impact on the character of the First Parliament, and as a result, the final text of the Constitution which that Parliament drew up. Most of the parties also tend to present lists which cut across divides of race, religion, region and ethnicity. Thus, even though a number of parties draw their main support from particular communities, the list system encourages them to reach out to various communities and to seek wide national support. The evidence we received from deponents here in Mauritius tended to point strongly in the direction of promoting the development of such lists rather than simply achieving compensation for under-representation of Opposition parties through, in effect, modifying the concept of Best Losers. At the same time, however, there was considerable support for the idea that the party lists, as published in advance, could provide place for a certain number of constituency candidates who might end up not having been elected. We were told that the public would fully accept that party leaders defeated in a particular constituency should benefit from being on PR lists.

Analysis of the electoral proposals

44. As will be seen from the evaluation which follows, there is no single system which answers all the problems without having certain disadvantages of its own. In addition to the obvious and desired consequences resulting from the adoption of any particular model, there can also be unintended outcomes which might at this stage be difficult to gauge. As Commissioners, we develop our judgment as best we can on the basis primarily of the evidence before us but also relying on our varying degrees of knowledge of the country and its history, as well as on our international experience. At the end of the day, adoption of one particular model or another (or of mutants or amalgams) will require an exercise of political judgment. Such judgment will have to be based on an appreciation both of the manifest constitutional issues at stake and any possible hidden variables. What follows is an attempt, in the spirit that guided the establishment of the Commission, to provide as much assistance as possible to those who eventually will have to make such judgment. We will deal with each of the proposals in turn, indicating one by one how we assess them and conclude by giving our opinion as to the option which we feel would best serve the interests of democracy in the conditions of Mauritius.

45. **PR Model A:** PR Model A, which was annexed to our terms of reference, has the distinct virtue of being easy to understand and to operate. In its original form, it restricted its operation to candidates in the twenty constituencies who had failed to come within the first three. Voter choice of identified candidates would be respected inasmuch as entitlement to benefit from the seat allocated for each 5% of the national vote, would be regulated by the percentage of votes gained. The candidate from the party who got the highest percentage

vote without being elected would be the first to benefit, and so on. This model would accordingly have strong advantages as far as simplicity and familiarity were concerned. It would also do little to disturb the stability produced by the present system. Yet it is precisely the smallness of its impact that reduces its attractions for present purposes. If the main objective of reform is to correct the gross under-representation of opposition parties produced by FPTP, Model A responds only minimally. It could help guarantee that unsuccessful party leaders would be able to take their seats in the House and that there would be at least a band of persons speaking for the Opposition. It would not, however, provide what we consider a reasonable measure of proportionality. Leaving aside the potential benefits of PR lists which it eschews, it fails to ensure that a party with very extensive support can reach the threshold of 25% membership of Parliament entitling it to make a significant input when constitutional amendments are being proposed. In our view, any dose of proportionality which would have the result of leaving a party with up to 40% of the votes unable to insist on negotiations and consensus for constitutional amendments, falls radically short of what is required, and cannot be supported.

46. **PR Model B:** PR Model B has the advantage of compensating significantly for the under-representation of the Opposition. In particular, it will prevent a government which might have less than 50% support in the country from amending the Constitution without the consent of the Opposition. As we have said, it represents the minimum that a reasonable measure of proportionality would require. It would be relatively easy to justify even to the most hardened supporters of the present system and not too difficult to apply. In addition to providing for sufficient votes to block unilateral imposition of constitutional amendments, it would ensure that a reasonable core of opposition political figures would survive from one election to another, fostering an element of stability in the House and encouraging persons to embark upon political careers with a fair expectation of continuity of occupation. The disadvantage of Model B is that it arbitrarily limits the correction to 25%, irrespective of the share of votes obtained. It also comes to the assistance only of the opposition and deprives the government party of any benefits which the list system offers. Another negative consequence is that it will result in a House of varying size depending of the number of seats to be added in order to make up for the deficit below 25%. This in turn would make it rather complex to explain to the general voting public. If there were no system which we regarded as manifestly superior, we would opt for PR Model B. It achieves substantial advances on the present situation without jeopardising stability.

47. **PR Model C:** This model provides for a major correction of disproportionality between the number of votes received and the number of seats obtained. It is strongly weighted in

favour of the FPTP constituencies so as to ensure that parties that fare very well in the constituencies will normally end up with enough support to form a government. It introduces a degree of flexibility which can be advantageous to parties seeking to ensure that its leadership core will be returned to Parliament and it will also make it easier for parties to introduce predictable elements of community, religious and gender representation. This might reduce or eliminate the need to retain the BLS, although we would not wish to see introduction of PR Model C made conditional on the retention or repeal of the BLS. Another advantage is that it facilitates the entry into Parliament of well-qualified persons with particular skills who might be put off by the robust character of constituency electoral battles. It should not be difficult to persuade the general public that a significant dose of PR is required to counteract the present gross under-representation of the opposition. It should also not be too difficult to explain the need for sufficient correction to enable at least party leaders to be returned, and ensure that parties having a substantial share of the votes are able to make meaningful interventions when constitutional amendments are being debated. A difficulty that might arise would be in relation to a fear that PR would act in such a way as to prevent the person who under the FPTP system emerged as a clear winner, ending up as Prime Minister. As we have pointed out, the circumstances where this can happen will be limited. In a two-party situation, it could hardly occur at all, and in a three-party context it could only occur if no pre-election alliance was established able to get close to 50% of the votes. Much, accordingly, would depend on the parties themselves. If they chose to run for office as three separate parties, none of whom ended up with 45% or more of the votes on their own, the first choice for Prime Minister would go to the party that was able to form a coalition with one of the other parties, thereby securing a majority of seats. To sum up: Model C scores strongly on the principle of fairness and is largely compatible with the principle of stability. By giving the parties extra options with regard to in the preparation of lists, it has the potential for making a significant contribution in terms of community relations and national unity, as well as gender representativity. It could also facilitate participation in public life of individuals with a major contribution to make but who might be kept out of it for various reasons, such as the vigorous nature of political campaigns, or lingering public prejudice against those living with disability. Allied to the bloc representation in the constituencies and the 10% threshold, we do not see the system as threatening to produce fragmentation on communal or religious lines, but rather the contrary. Thus, on the score of impact on national harmony and social progress, Model C opens up positive prospects. At the same time, it must be noted that PR Model C is self-explanatory for those unfamiliar with PR. The parties and the voting public would accordingly have to accustom themselves to the list systems.

48. **PR Model D:** The great advantage of PR Model D is at the same time its greatest disadvantage. It is undoubtedly the fairest of all the systems as far as correspondence to the will of the people is concerned. Its introduction, however, require either reducing the number of members presently being returned in each constituency or else doubling the size of Parliament. We regard neither of these options as feasible in Mauritian conditions. There are also a number of other objections based on unfamiliarity and the risk of fragmentation, but we do not feel it necessary to go into these, since none of the deponents argued in favour of PR Model D and we believe that although as a matter of abstract principle a 50/50 split of constituency representatives and persons chosen on PR lists has a lot to commend it, PR Model D cannot be regarded as a serious candidate within the hands-on and realistic framework established by our terms of reference.

49. **Model E:** Model E, which was loosely referred to as Fourth Past the Post has the advantages of simplicity and familiarity and its capacity to introduce significant correction of disproportionality in election outcomes. Its critics, however, pointed out that it had the potential severely to undermine some of the best features of the existing system. Thus, internal tensions between candidates could become unmanageable if each was seeking to secure the position ahead of their two colleagues as the person occupying fourth position. This could in turn contribute to communal appeals on behalf of individual candidates. In addition, the electorate generally could be encouraged along communal lines to split the vote between two members of the community on the party ticket and another member of the community belonging to another party. When we looked at the impact that the application of Model E would have had on the outcome of the last three elections, it emerged that there would have been a very large increase indeed in the representation of persons from one particular community. The evidence before us indicates that introduction of Model E could be difficult to explain to the electorate because it would appear to counteract the will of the electorate. More important, however, it would appear to contain within it grave hidden possibilities for encouraging an increase in communal tensions. We have no doubt that the authors of the proposal had no such objectives in mind and, indeed, saw the system as an apparently neutral one that could be easy to operate on objective mathematical criteria. Nevertheless, we cannot disregard the fact that it has an unacceptable potential for destabilisation of national harmony. The risks would appear simply to be too great. In addition, the special advantage to be gained from the PR list system would be lost.

50. It is clear from the above evaluation that there is no single model that meets all the requirements in an unqualified manner. We also underline the fact that there may be hidden implications relating to the promotion of communal or religious mobilisation of which we are

not aware. It is also not easy to predict with certainty how party or voter behaviour would be affected whichever model is adopted. Yet unless one works on the principle that nothing should ever be done for the first time, the Commission is of the view that it is possible for it to make a firm recommendation. We believe that on all the available evidence PR Model C clearly heads the field, meeting the guiding criteria in a balanced and harmonious way with an acceptably low degree of risk. If it is accepted in principle, as we believe it should be, there is considerable room for adaptation and compromise in relation to its details. Representatives of the leading parties who deponed before us indicated a willingness to accept any figure between 20 and 30. Our preference would be for the extra PR representatives to total 30. This would enlarge the many benefits which PR has to offer, including the involvement of more persons on the PR lists of the leading party, than would otherwise be the case. It would also not add significantly to the risk of the party that emerges as winner on the basis of FPTP not ending up as the party of government. Consideration could also be given to the criteria for establishing the party lists. There could be requirements binding on all parties, such as the need for ensuring adequate gender representation. There also could be a general requirement, or, alternatively, internal party statutes, to the effect that the lists will help establish an appropriately balanced and representative 'rainbow' character for the party slate that ends up in Parliament. Another area that would be open for debate would be whether the electors should have a special vote for PR candidates for PR lists to establish the share of the national vote of each party, or whether the votes given to the candidates in the constituencies should be totted up to establish the national percentage gained by each party.

We leave these questions open. We received relatively little information on them, save to say that there was widespread support for the idea of using the list system to provide for the following :

- Enabling leading party figures defeated in the constituencies to enter parliament.
- Facilitating the entry into parliament of individuals with needed qualities who might be reluctant to run for office in bruising and expensive constituency battles.
- Securing greater participation of women in the work of parliament and government.
- Opening the way for persons from disadvantaged groups, such as the disabled, to make their contribution.
- And, above all, establishing mechanisms that will subsume the BLS and further its underlying affirmative objectives without perpetuating its anachronistic and divisive aspects.

51. In technical terms, adoption of a measure of PR would require amendment to the First Schedule of the Constitution. In the absence of decisions on exactly how PR Model C should be applied, it would be premature to attempt to lay down precise formulations for such amendments. We accordingly recommend in general terms that the First Schedule of the Constitution be amended to take account of the following:-

- (i) There shall be 62 seats in the Assembly as at present, with 20 constituencies each returning three members and Rodrigues two members.
- (ii) There shall be a further 30 members chosen on the basis of lists provided by parties receiving more than 10% of the national vote. Such lists will be in descending rank of eligibility. They will be published in advance of elections and may contain a restricted number of names of persons standing for constituencies (should such persons in fact end up being as constituency members then their names on the list would be disregarded). The objective of the lists will be to introduce a measure of compensation in the outcome of elections so as to make the final totals of seats held by the different parties reflect more accurately the support that the parties have received in the country at large. The lists will be composed in such a way as to secure greater gender representativity and to provide the reassurance that the Best Loser System has until now provided.

Correcting Under-representation of Women

52. Mauritius can justly be proud of the admiration which its democratic life enjoys internationally. It cannot, however, hold up its head in terms of participation of women in political life. Our terms of reference require us to make proposals regarding amendments to the Constitution so as to consolidate and strengthen the democratic system. A situation in which half the population ends up with only a one-twentieth share of representation manifests a grave democratic deficit which, we believe, requires special attention in our report. It is not that the under representation is unacknowledged. The figures speak for themselves and none of the deponents attempted in principle to justify them. Given the generally progressive and open nature of Mauritian society, the gross degree to which women are under-represented in Parliament and government comes as a surprise, placing it at the bottom end of countries in the SADC region. In a survey done for the SADC in 1999, the percentage of women in Parliament was as follows – South Africa 29.8%, Mozambique 28.4%, Seychelles 24%, Tanzania 16.3%, Angola 15.1%, Namibia 14.1%, Zimbabwe 14%, Lesotho 10.3%, Zambia 10.1%, Botswana 9%, Mauritius 7.6% and Swaziland 7.3%. Despite

the fact that the Heads of State and Government of the SADC committed themselves as long ago as 1997 to the achievement of at least a 30% representation of women in political and decision-making structures by year 2005, the percentage of women in the Mauritian Parliament today has in fact dropped to 5.6%, making it possibly the lowest in the whole of the SADC region.

53. A number of deponents stated that the lamentable disproportion was a result of culture and the reluctance of women to be candidates - all such deponents were in fact men. On the other hand, we received forceful testimony, mostly but not exclusively from women, to the effect that the political parties tended to be male-dominated and to lack due sensitivity for the needs and concerns of the female half of the population. The main complaint was that no serious attempt was being made to encourage women to stand for office or to find seats for women in constituencies where they have a good chance of success.

54. It is clear that there is no formal discrimination which expressly excludes women from political life. Thus, there is nothing in the Constitution or the law which prevents political parties from choosing women in greater numbers to be candidates and part of the government. In practice, however, the manner in which candidates are chosen appears heavily to discriminate against women. Such discrimination has a self-fulfilling effect; instead of women being encouraged and prepared, for the rigours of political activity, as should be all new entrants, they are required to have special courage and enterprise to allow their names to go forward. Mauritians are family-orientated and this should not be put in question. What needs to be examined is how to find means whereby responsibilities in the family can be more equitably shared, with backup public support where appropriate, so as to enable women to take their rightful place in public life.

55. As the Report of the Task Force set up by the present government stated (in October 2001), the gap between legal and factual quality in the area of power and decision-making is so wide that women's interests and concerns are not adequately represented at policy levels and women cannot influence key decisions in social, economic and political areas that affect society as a whole. Ideally, the political parties will themselves take the initiative in seeing to it that women emerge in substantial numbers onto the political landscape. If the experience of other countries such as India, South Africa, Sweden and Spain is a guide, they will find that considerable voting advantage flows from fielding large numbers of women candidates. The question that arises, however, is whether sole reliance should be placed on the willingness of the parties to initiate meaningful change. The party programs show an awareness of the issues. What we have to consider is whether the electoral arrangements

should not be adapted so as either to require a degree of inclusion of women, or else to give incentives towards such inclusion. The system of PR lists provides basis for one such incentive, so that it is appropriate to deal with the matter in this section of our report.

56. International experience shows that both voluntary and obligatory methods have been used to correct the under-representation of women in decision-making structures. In South Africa the breakthrough came when the African National Congress adopted an internal statute requiring that 30% of its candidates for the National Assembly be women. We believe that this figure has since been raised to 33.3%. The adoption of PR in the Constitution made it relatively easy to achieve this minimum proportion; after the party membership through their branch representatives had voted for all the candidates on the ANC lists, so that those with the most votes were at the top and those with the least at the bottom, adjustments were made in the ranking to ensure that at least three out of every bloc of ten names on the list were those of women. This resulted in a number of women moving up the lists in a manner which respected the ranking given to each of them by the branch representatives. In India, the issue of women's representation in public political life has been on the agenda for a number of years. The result has been that the Constitution has required since 1992 that not less than one-third of all seats in every Panchayat (village assembly) and every Municipality be reserved for women. Since 1998 a constitutional amendment requiring at least one-third of the total number of seats in the Lower House to be filled by women has been tabled before parliament. Although all the major parties have agreed to it in principle, no consensus has been reached as to how the requirement of one-third is to be met and the Bill has not yet been passed. It is particularly difficult where MPs are elected in single-member constituencies to establish that one MP in three be female. Various systems of rotation have accordingly been proposed. Another problem has been how to ensure that women from communities referred to as backward communities and scheduled castes be included, as well as women from the group referred to as Anglo-Indian.

57. We endorse the view that the major responsibility for correcting the massive gender imbalance rests with the parties. At the same time we believe that progress in reaching the agreed SADC target has been so slow that a constitutional and/or electoral fillip needs to be given. Hopefully this is one of the issues on which wide cross-party consensus will be achieved. This would not only produce greater fairness, but a sense of reassurance that rules would be the same for all parties and that none would gain advantage or suffer disadvantage from adopting positions that involve moving beyond formal equality to substantive equality. In the absence of far more evidence than we received, we are not in a position to make any firm and specific recommendations. We do, however, point out that there are a number of

measure that could be introduced with relative technical ease. They vary in the extent to which they operate directly or indirectly. We list them as follows :

- (i) if the Indian approach is to be followed, then a requirement could be made that in each bloc of three candidates nominated in the twenty constituencies, at least one be a woman and one be a man;
- (ii) If the South African experience is to be a guide, the parties could be required to rank their candidates on the PR lists in such a sequence that at least every third candidate be a woman and every third a man. Since women, like men, share all the characteristics of the nation, the parties could factor in appropriate balancing of elements other than gender when nominating women candidates.
- (iii) If public funding of political parties is to be introduced, the allocation of funds could be made dependent in significant part on the extent to which women are put forward as candidates and women obtain seats.

Anti-Defection Provisions

58. In the section of this Report dealing with the powers of the President, reference was made to the need to introduce anti-defection provisions. The objective of such measures would be to discourage wheeling and dealing between the leaders of one party and members of another. The dangers to democracy are particularly great if members of the latter party can be induced to break ranks and thereby threaten the stability either of governments or of the opposition. In the absence of such measures, Members of Parliament may accordingly succumb to offers of high office or simply be suborned by material rewards. The will of the electors is frustrated and the institution of parliament brought into disrepute.

59. As a matter of constitutional theory it is possible to make out a case that persons elected in constituencies are accountable to their particular voters and not to the party to which they belong. As far as Mauritius is concerned however, this argument is difficult to sustain because persons are usually voted for on a party ticket of three. If and when PR is introduced, the right of the individual Member to remain on in Parliament even after breaking away from his or her party, becomes tenuous in the extreme. If a separate vote for lists is introduced, the voters will have voted for the party list and not for the individual. Alternatively, if it is decided not to have a separate vote, then the successful persons on the list will have got into Parliament because of the share that the party as a whole received of

the national vote, and not because of a particular vote for him or her. It is usual, therefore, for the electoral law in countries using PR to provide that when an MP ceases to be a member of the party, he or she loses the right to stay on in Parliament. Certain important qualifications are made, however. Thus in India, a fraction representing a third of the party MPs might break away without its members losing their place in the lower House. Furthermore, parties are entitled to merge with other parties. The anti-defection law, therefore, is not aimed at freezing political development but rather at preventing the nibbling away of members of a party so as to constitute or reconstitute majorities. It is also important to note that the Indian provisions establish disobedience of party directives in Parliament as the criterion for expulsion. This means that a party leader could not simply get rid of an independent-minded colleague in Parliament by arbitrarily expelling him or her from the party, and thereby causing him or her to forfeit a seat in the House. The test for expulsion from Parliament would be the objective one of voting against or abstaining from supporting party directives in Parliament. In Sri Lanka there has been litigation in the Supreme Court concerning alleged stifling of freedom of speech inside major parties by expulsion from the party and therefore from Parliament of Members who have challenged certain behaviour of their leaders. At the moment the South African Parliament is about to debate a draft bill which would allow MPs elected on a pre-electoral joint alliance ticket to declare within a specified period whether they wish to support the leadership of an alliance partner that has decided to break away from the alliance, or whether to remain on as members of the alliance. The draft legislation has aroused considerable controversy and highlights the care with which anti-defection measures have to be drafted.

The Best Loser System

60. One of the questions repeatedly raised with the Commission and with considerable emotion, was what should happen to the BLS if and when PR is introduced. At a technical level the question was whether the BLS should function before or after the application of PR. In a more substantive way, we were asked whether or not the BLS should survive constitutional reform at all. We would like to reiterate that we do not regard it as central to the introduction of PR that the BLS be either retained or abolished. The case for introducing a measure of PR is overwhelming and should not be jeopardised by controversy over BLS. Nevertheless, given the extraordinary attention devoted to the topic by the deponents, and the extent to which decisions about BLS will have to be taken when any new electoral scheme is introduced, we will devote some attention to the matter.

61. No issue before us aroused more intense comment. The great majority of deponents criticized the BLS vehemently. They pointed out that it formally introduced elements of

communalism into the Constitution and violated the very essence of developing Mauritian citizenship; that it was based on four communities identified nearly forty years ago on an arbitrary basis which no underlying present-day sociological rationale; that calculations for the appointment of BLS were based on 1972 figures which were completely out of date; that results in individual cases have turned out to be irrational and paradoxical. The defenders of the BLS, far fewer in number, for the most part said they did not like BLS in principle but were reluctant to abolish it because it had become integrated into Mauritian electoral practice and provided a degree of reassurance that was meaningful to one or more communities. Only one group of deponents supported BLS without reservation, though they too acknowledged that it presented difficulties.

62. There are four possible ways in which the BLS can be treated in the proposed new constitutional arrangement: It can be abolished without more ado; it can be retained as is, it can be kept on in modified form; or it can be subsumed into the new dispensation. For reasons which follow, we have come to the conclusion that the best approach would be to seek to devise alternative and credible means of providing reassurance to the community or communities most supportive of the BLS; which will be subsumed into the new arrangements. In this way, it will be possible to achieve the original objectives of BLS in a manner that is compatible with contemporary political reality. In consequence, the essence of the BLS will be retained but the form adapted in a principled way to present-day conditions.

63. The main argument in favour of retaining the system with all its manifest defects is simply not to rock the boat. Yet, as we have pointed out, unless one adopts the principle that nothing should ever be done for the first time, some degree of risk is involved in any change. Thus, opponents of independence for Mauritius forty years ago could point to serious risks of inter-communal tension erupting if the country's status as a British colony was dissolved. The answer was not to abandon the quest for independence, but to devise constitutional and electoral arrangements which would encourage parties to be established, and MPs to be chosen, on lines that traversed ethnic and other divides. Hence, the adoption of the three-votes-for-three members system. While counteracting one danger, however, this electoral scheme was seen by at least one group of minority leaders as carrying the risk of resulting in another, namely the electoral marginalisation of that community. Hence the introduction of an electoral amendment which turned out to be as specific to the Mauritian situation as its name was novel in the world: the BLS. The search for zero risk did not stop there. There was the danger that inclusion of BLS on communal lines could disturb the majority obtained as a result of the initial election. Hence the BLS provided for up to eight additional members, the last four being chosen from the ranks of best losers on the majority

party ticket. The result has been an electoral device that has increasingly divided Mauritians and baffled visitors to the country.

64. It is important to remember that from its inception the BLS had relatively weak numerical impact on voting strength in parliament. It was not part of a consociational scheme in terms of which the consent of designated communities had to be obtained to enable any governmental measure to go ahead. Yet, through its symbolical significance it was considered to be an integral part of the compact that led to independence. Even its critics had to concede that the BLS manifested a form of constitutional concern for certain communities, which, even if subordinate and dilute, was nevertheless express and measurable. It is against this historical and psychological background that reluctance to countenance the end of an electoral device which appears to be indefensible in the contemporary setting, has to be understood. We accordingly do not feel it helpful to treat those who support retention of the BLS as simply being retrograde communalists. What is important is to get to grips with the underlying reassurance which BLS offered at the time of its inception, not to place labels on those unwilling to see it dismantled.

65. The BLS was introduced to meet special needs more than three decades ago. We can now analyze its position in the overall constitutional setup in the light of the considerable experience gained since then. What stands out is that the bloc-of-three vote appears to have achieved substantial success in encouraging parties to straddle community divides when nominating candidates. This is not simply because of any subjective desire to appear politically correct, but because of the advantages which the block-of-three system gives to broadly-based tickets. The result is that no community is left out. The degree of correction to community balance which the BLS provides accordingly tends to be tangential rather than substantive. A second significant development since the introduction of BLS has been the upsurge of a strong pan-Mauritius political consciousness which has reflected itself in the elimination from the census of any reference to community, religion or ethnicity. By being based fairly and squarely on community and religious identification, the BLS finds itself isolated and stranded as an uncomfortable relic of an earlier era. The degree of reassurance it provides is more of a symbolical and emotional nature than a practical one. Such comfort as it offers comes at the price of it appearing as odd and anachronistic to the very security it was designed to offer. It carries with it the real danger of marginalizing from the rest of society those identified with it so that what started off as intended to be a protection could end up becoming an impediment.

66. We accept that the whole question of relationships between communal, ethnic and religious groups in a united Mauritius, needs to be handled with realism and sensitivity. The right to be the same in terms of the basic entitlements of citizenship does not exclude the right to be different in terms of culture, language, religion and personal preferences. The problem is how to establish an appropriate connection between the right to be the same and the right to be different. International human rights law has considered this theme and given increasing support for the protection of the rights of minorities. In general, however, it seeks to protect the rights of minorities in ways quite different from that implicit in the BLS. Thus, it calls upon all states to guarantee:

- (1) the right of all persons to equal participation in public life and equal protection of the law;
- (2) the correlative right of all persons not to be discriminated against because of their membership of minority groups;
- (3) the right of all persons to associate in communities based on language, culture or religion.

International human rights instruments frequently add a further right, namely,

- (4) the right to require the state to take special affirmative measures to overcome the effects of past discrimination.

There is also increasing support for the recognition of a

- (5) right to live in a pluralist society in which the state actively promotes diversity by recognizing and supporting language, cultural, and religious groups.

It will be noted that international human rights law does not give minority groups the right to receive special treatment in terms of laws concerning the enjoyment of citizenship. Outside of the sphere of affirmative action, there has been a general move away from electoral arrangements based upon direct representation of groups in the legislature. In South Africa, with its intense and historically created minority concerns, the electoral system is completely free of overt references to race or ethnicity. Minority concerns were met by having an entrenched Bill of Rights that gave extensive recognition to the principles mentioned above. These were reinforced by sunset clauses guaranteeing political power-sharing of parties (not races) for a limited period. A considerable degree of federalism also helped allay fears. None of these measures expressly invoked race or ethnicity. On the other hand, there are some consociational states, such as Belgium, where the creation of language zones has been foundational to the structure of government and the exercise of rights. In Singapore the electoral system has been constructed in such a way as to require a certain communal balance. We are unaware, however, of any country where after the results of a non-ethnic

poll are declared, ethnic considerations are introduced to top-up the representation of communities considered to be under-represented.

67. There can be no doubt that not only can the BLS not claim support from international human rights principles, its continued existence jars severely against the general spirit of the Mauritian Constitution. The Constitution enshrines political rights in a manner that does not refer to community or religion. It goes much further, however. It structures itself around an electoral system designed expressly to encourage the creation of parties that draw their support from voters belonging to all communities. The evidence we received made it clear that in practice the parties pay careful attention to producing balanced tickets so as to appeal to voters from all communities. This reflects itself in the diversity of members chosen through the bloc-of-three system.

68. As we have said, minority groups are entitled to equality and to be protected against unfair discrimination. It is widely accepted that the state is under a duty to provide remedies for persons who feel that because of belonging to a particular group they are denied their rights to advance in the social, educational or economic spheres or to get ahead in public life. Many countries provide for equal opportunities commissions to hear and investigate complaints, and by means of conciliation or court actions to provide appropriate redress. We have also mentioned that freedom of association guarantees to minority groups a certain measure of autonomous existence and development. The evidence before us indicated that successive Mauritian governments have in fact given extensive support to enable language, cultural and religious groups to flourish. Indeed, some deponents argued that because the state gave material support to the cultural groups to which they belonged, it should also recognize them for purposes of the BLS. In our opinion, this argument inverts what the appropriate relationship should be. State generosity for language, cultural or religious groups reduces rather than enhances their claims for special and particularized treatment in the political system. Indeed, groups subjected to neglect or threatened with discrimination or marginalisation by the state, would have greater claims for special protection than those who benefit from its subsidies. The evidence we received also indicated that the state had respected the rights of persons belonging to cultural, religious or linguistic groups to enjoy their culture, practise their religion, use their language and form, join and maintain cultural religious or linguistic associations.

69. At the time the independence Constitution was adopted it seemed that the rights of minorities could best be protected by means of an attenuated form of community representation in Parliament, namely the BLS. Election practice and governmental behaviour

since then has indicated that there are far more substantial forms of providing protection of minority interests. Some of them are formally written into the Constitution, others have become an integral part of the Mauritian way of doing things. It is the opinion of the Commission that the BLS has outlived its original purpose and in fact is increasingly becoming counter-productive. At the same time the Commission believes that the symbolical reassurance given by the BLS is something which should not be ignored. Subsuming the BLS into the new Constitutional arrangement while divesting it of its unacceptable features, should, in our view, be accompanied by a process of explanation and negotiation with those who may feel their rights are being diminished. If insecurities exist, the answer is not simply to respond by retaining indefensible practices. Rather it is to work out together with the community or communities concerned ways and means of dealing with the insecurity.

70. The process accordingly becomes as important as the outcome. The principle of 'nothing about us without us', is particularly significant for minority groups that regard themselves as vulnerable. Our recommendation is that a process be established under which the government and all interested parties could meet with representatives of any community which felt it would be losing out if the BLS were to be absorbed into the new constitutional arrangements. The purpose would be within an agreed framework of principles, to find ways and means of assimilating the BLS into the new dispensation without prejudicing the status of the community or communities concerned and without keeping alive features which are widely considered to be anachronistic and offensive. New undertakings could be given both of a formal and an informal nature. Thus, the party leaderships could agree that certain conventions and practices would be followed on an across-the-board basis. At the more institutionalized level, anti-discrimination measures could be strengthened. In each case it would be important to focus on where the shoe pinches, and to seek practical and effective forms of relief. To conclude, we believe it would be to the disadvantage of members of the community or communities concerned as well as of Mauritian society as a whole, if undue controversy over the BLS were to distract attention from the major thrust of the amendments. These are matters that should be put on the table and discussed openly and honestly with all those most directly affected. The principles governing the discussions should be established by agreement in advance. If representatives of any community feel that the community's interests are being affected in more than one way by the proposed constitutional changes then all the different aspects should be put on the agenda and dealt with one by one with a view to achieving an acceptable, holistic outcome. Thus, if such representatives felt that the changes would have an impact on the community's interests with regard to the BLS, alterations to constituency boundaries and the right to establish communal or religious parties, all should be honestly dealt with in a comprehensive and

balanced way. The Commission appreciates that these are matters that lie in the province of the government and the representatives of the community or communities concerned. It strongly, however, recommends, two things: that the nettles be grasped, and that all those with an interest in the matter be engaged in the process of reducing any consequent constitutional stings. The Commission is of the view that discussions in the spirit that led to the compromises that made the independence Constitution possible, would have the capacity of ensuring a relatively painless process of updating and upgrading the Constitution as well.

The Proposed Prohibition of Communal or Religious Parties

Item (f) "*make proposals for the prohibition of communal or religious political parties*"

71. The Commission is invited to propose a prohibition of communal or religious political parties. Such prohibition might raise questions of constitutionality. In terms of Section 3 of the Constitution, everyone in Mauritius may, subject to respect for the rights and freedoms of others and for the public interest, enjoy the right to freedom of assembly and association. Clearly a direct prohibition of communal or religious parties would diminish the freedom of assembly and association of their members. The question would be whether or not such limitation could be justified in terms of upholding the rights and freedoms of others or the public interest. If any doubt existed on the meaning of the Constitution we believe that this is an area where the Constitution should be amended so as to provide the express clarification of the principles involved.

72. We would strongly oppose any general derogation from freedom of assembly, which is vital to the existence of political democracy. Consideration could, however, be given to introducing provisions in the Constitution which establish more clearly than does the text at present what constitutional values may be said to underlie the concept of the public interest. The character of Mauritius is expressed in the laconic statement that it shall be a sovereign democratic state (Section 1). There is no preamble⁵ or statement of foundational values⁶.

⁵ The Preamble of Constitution of South Africa, 1996, reads as follows:

We, the people of South Africa,
Recognise the injustices of our past;
Honour those who suffered for justice and freedom in our land;
Respect those who have worked to build and develop our country; and
Believe that South Africa belongs to all who live in it, united in our diversity.
We therefore, through our freely elected representatives, adopt this
Constitution as the supreme law of the Republic so as to –

Heal the divisions of the past and establish a society based on
democratic values, social justice and fundamental human rights;

Lay the foundations for a democratic and open society in which
government is based on the will of the people and every citizen is

We believe that there is a need to spell out some of these basic values in the text of the Constitution. This could be done either by way of a preamble or by insertion of a fuller description of the character of Mauritius in Chapter 1. Thus, a new provision could be added along the following lines -

"2(bis) Mauritius shall be an open and democratic society, based on the rule of law and the principle of unity in diversity, in which :

- (1) government is based on the will of the people and every citizen is equally protected by the law;*
- (2) there shall be social justice and respect for the fundamental rights of all;*
- (3) the state shall be non-sectarian and equally respectful of the rights of members of all faiths;*
- (4) there shall be no discrimination against individuals or communities on grounds of ethnic origin, caste, language, culture, belief or non-belief".*

equally protected by law;

Improve the quality of life of all citizens and free the potential of each person; and

Build a united and democratic south Africa able to take its rightful place as a sovereign state in the family of nations.

May God protect our people
Nkosi Sikelel'iAfrika. Morena boloka setjhaba sa heso.
God seën Suid-Afrika. God bless South Africa.
Mudzimu fhatutshedza Afurika. Hosi katekisa Afrika.

The Preamble of the Constitution of India declares
WE, THE PEOPLE OF INDIA, having solemnly resolved to constitute India into a [SOVEREIGN, SOCIALIST, SECULAR, DEMOCRATIC, REPUBLIC] and to secure to all its citizens:
JUSTICE, social, economic and political;
LIBERTY of thought, expression, belief, faith and worship;
EQUALITY of status and of opportunity; and to promote among them all;
FRATERNITY assuring the dignity of the individual and the unity [and integrity] of the Nation;
IN OUR CONSTITUENT ASSEMBLY this twenty-sixth day of November, 1949, do HEREBY ADOPT, ENACT AND GIVE TO OURSELVES THIS CONSTITUTION. The words in square brackets were introduced in by constitutional amendment 1976.

⁶ Chapter 1 of the Constitution of South Africa reads as follows:

FOUNDING PROVISIONS

The Republic of South Africa is one sovereign, democratic state founded on the following values:

- (a) Human dignity, the achievement of equality and the advancement of human rights and freedoms.
- (b) Non-racialism and non-sexism.
- (c) Supremacy of the constitution and the rule of law.
- (d) Universal adult suffrage, a national common voters roll, regular elections and a multi-party system of democratic government, to ensure accountability, responsiveness and openness.

73. Consideration could also be given to inserting a clause in an appropriate place in the section on Fundamental Rights to read as follows:

- "(1) every adult citizen has the right to vote in secret for any legislative body established in terms of the Constitution and the right to stand for and occupy any public office if elected;*
- (2) everyone is free to make political choices and to form and campaign for a political party or promote a political cause;*
- (3) such rights shall only be limited by a law of general application which would be reasonable and justifiable in an open and democratic society, including a law designed to prevent incitement to religious, ethnic, racial, communal, caste or gender hatred or to inhibit the fomenting of division based on religion, ethnicity, race, community or caste";*
- (4) (i) the law may require that all parties competing in elections be registered with the electoral authorities on such terms as may be prescribed;*
 - (ii) the electoral officer concerned may refuse to register a party if satisfied on reasonable grounds that it is constituted on such a basis as to foment division based on religion, ethnicity, race, community or caste. Any such refusal shall be subject to appeal the Supreme Court".*

74. If for any reason it is felt that the above clauses should not be given constitutional status, they could be included in the legislation dealing with elections. The disadvantage of consigning it to legislation is that it would leave the provisions open to constitutional challenge under Section 3B of the Constitution, obliging the courts to determine the issue without any guidance. In our view, this is a matter that should be fully engaged with in the political process so that the Constitution can be adapted in order clearly to embody and articulate the guiding principles. The courts will then have the task of applying those principles to cases as they arise. These are difficult questions being hotly debated in courts and legislatures throughout the world. In our view, the Mauritian Constitution should establish a principled framework which is neither so vague as to give hardly any guidance at all nor so prescriptive as to attempt to meet all future situations.

75. The effect of the proposed constitutional amendment would be that there would be no direct prohibition of communal or religious parties as such. Nor would such parties be prevented from participating in elections simply because they were communally or religiously based. Such parties could, however, be prevented from running in elections if the electoral officials had reason to believe that they were actively fomenting harmful division based on religion, ethnicity, race, community or caste. The provisions in the Criminal Law penalising what has been referred as "hate speech" could be energetically implemented. Furthermore, parties could be required to undertake in general terms that they will respect the Constitution of Mauritius and abide by the Electoral Code of Conduct which we will recommend. In this way, the broad principle of freedom of association would be maintained, while the specific damage that could be caused to the unity and integrity of the nation by the participation in elections of parties⁷ which function in a manner that seriously and in a clear and immediate manner threatens the democratic and tolerant foundations of the nation, would be avoided.

[NOTE: The proposals in this Report for a new electoral system were not directed to possible implications for Rodrigues, a matter which is left open.]

⁷ In India the Representation of the People Act 1951 provides that parties wishing to contest elections must apply to the Election Commission for registration as a political party for the purposes of the Act. The memorandum or rules of the applicant body "shall contain a specific provision that the association or body shall bear true faith and allegiance to the Constitution of India as by law established, and to the principles of socialism, secularism and democracy, and would uphold the sovereignty, unity and integrity of India". (Section 5). After considering all the relevant factors and giving representatives of the association reasonable opportunity of being heard, the Commission shall decide either to register the association or not (Section 7). The decision of the Commission is final (Section 8).

CHAPTER TWO

PROPOSED AMENDMENTS TO THE CONSTITUTION AND ELECTORAL LAW SO AS TO STRENGTHEN GUARANTEES OF FREE AND FAIR ELECTIONS

Strengthening the Electoral Supervisory Commission

76. Item (a) of the Terms of Reference requests the Commission to -
"review the role of the Electoral Supervisory Commission and make recommendations on how it can be strengthened and its responsibilities extended to uphold the democratic fundamentals of the Mauritian society in particular to ensure really free and fair elections;"

77. The Constitution of Mauritius ushered in a sovereign democratic republic for the free people of Mauritius. The sine qua non of any stable, mature and vibrant democracy is the holding of regular, free and fair elections. Mauritius has an enviable track record in this regard, as Mauritius has had regular elections since its independence, except for one controversial period early on when the life of the National Assembly was prolonged in circumstances that the Constitution has since been amended to prevent. The existence of independent constitutional electoral management bodies is the bedrock which sustains any democratic system. The avoidance of any interference by the executive or any other body is fundamental to any fair electoral process. In the interest of the integrity of elections it is of utmost importance that the electoral management bodies be free from any kind of interference from the Government of the day or other political parties/groups. These electoral management bodies have to act as neutral umpires in the electoral process and they have to lay down and enforce the ground rules for total transparency in the system and for securing a level playing field for competing political parties and candidates. The Constitution of Mauritius has provided for three independent electoral management bodies, namely, the Electoral Boundaries Commission, the Electoral Supervisory Commission and the Electoral Commissioner. Each of these bodies has constitutionally designated functions in regard to all matters relating to administration and supervision of elections as indicated in **Annexure D**.

78. The various deponents and the suggestions/memoranda received by the Commission indicated that while the three Electoral Management Bodies have more or less functioned in an independent and neutral manner in the past, there is a need to strengthen the structure of

these bodies so as to make them more effective. Emphasis was placed on the importance of vesting these bodies with more powers with strength as enforcement agencies. The Commission has had the benefit of the views of the Chairman and Members of the Electoral Supervisory Commission/Electoral Boundaries Commission (Chairman and the Members of the two bodies are common) and the Electoral Commissioner in the several rounds of discussions with them. The Electoral Supervisory Commission/Electoral Boundaries Commission also submitted a Memorandum to us containing their views on the matter, which is at Appendix E. After detailed examination and consideration of all suggestions received by us, we recommend various structural and organisational changes affecting the role of the above-mentioned three electoral management bodies.

79. The Commission's proposals take cognizance of the fact that Mauritius has limited resources and that there are extensive claims from many bodies on the public purse. Nevertheless we are of the firm opinion that to strengthen public confidence in the electoral process the following principal changes have to be made.

- (i) The Electoral Supervisory Commission and the Boundaries Commission should be formally merged into a single body with a full-time Chairperson and a full-time administration officer and premises of its own.
- (ii) The Chairperson and all the members of the new body should be appointed by the President in his or her own deliberate judgement after appropriate consultation.
- (iii) The Electoral Supervisory Commission is to draft a comprehensive electoral Code of Conduct with statutory force to which all parties and candidates shall subscribe..
- (iv) Once Parliament has been dissolved the Electoral Supervisory Commission shall set the date for the election.

Our more detailed recommendations follow.

Methodology for Appointments to the Electoral Management Bodies:

80. Presently, the Chairman and Members of the Electoral Boundaries Commission are appointed by the President, acting in accordance with the advice of the Prime Minister tendered after the Prime Minister has consulted the Leader of the Opposition. However,

there is a different methodology prescribed in regard to the appointment of the Chairman of the Electoral Supervisory Commission, although the Members of the Electoral Supervisory Commission are appointed by the President, acting in accordance with the advice of the Prime Minister after the Prime Minister has consulted the Leader of the Opposition, as is the position in regard to the appointment of the Chairman and Members of the Electoral Boundaries Commission. The Chairman of the Electoral Supervisory Commission is appointed by the President, in accordance with the advice of the Judicial and Legal Service Commission. The Chairman of the Electoral Supervisory Commission can be chosen from any field having vast and varied experience. We recommend that the Judicial and Legal Service Commission has no role to play in regard to the appointment of the Chairman of the Electoral Supervisory Commission. We also feel that as the Electoral Boundaries Commission and the Electoral Supervisory Commission are both independent constitutional bodies, the appointment of the incumbents to the office of the Chairman and Members of these Commissions should follow the same procedure as will be set out below.

81. As stated above, the Electoral Boundaries Commission and Electoral Supervisory Commission are both independent constitutional bodies dealing with all matters relating to the holding of free and fair elections. It is of the utmost importance to ensure that these institutions not only remain independent but are also perceived to be completely independent and non political. The Electoral Supervisory Commission/Electoral Boundaries Commission in their Memorandum suggested that the Chairman and Members of both these Commissions be appointed by the President after consultation with the Prime Minister and the Leader of the Opposition. While appreciating this suggestion, we, however, feel that the President should have the benefit of wider consultation in regard to these appointments and the President may also, acting in his own deliberate judgement, like to consult the Leaders of other parties in the Assembly, as is the case in regard to the appointment of the Ombudsman. We would accordingly recommend that the appointment of the Chairman and the Members of the aforesaid bodies should be made by the President, acting after consultation with the Prime Minister, the Leader of the Opposition, and such other persons, if any, as appear to the President, acting in his own deliberate judgment, to be leaders of parties in the Assembly.

82. As per the provisions contained in Section 40 of the Constitution, the Electoral Commissioner is appointed by the Judicial and Legal Service Commission. The office of the Electoral Commissioner is also an independent constitutional position and we would recommend that the appointment to the office of the Electoral Commissioner should also be made by the President, acting after consultation with the Prime Minister, the Leader of the Opposition and such other persons, if any, as appear to the President, acting in his own

deliberate judgment, to be leaders of the parties in the Assembly, as is being recommended by us in regard to appointments of the Chairman and Members of the Electoral Supervisory Commission and the Electoral Boundaries Commission.

Composition of the Electoral Supervisory Commission/Electoral Boundaries Commission

83. Both the independent constitutional bodies, namely, the Electoral Boundaries Commission and the Electoral Supervisory Commission deal with matters relating to the electoral process. While the Electoral Boundaries Commission is required to review the boundaries of the constituencies after every 10 years, the Electoral Supervisory Commission has general responsibility for, and supervises, the registration of electors for the election of members of the Assembly and the conduct of elections of such members. In practice, the Chairman and Members of these two bodies have always been one and the same person since the time these bodies have been in existence. We feel that in the interest of better coordination and effectiveness, it would be better to have only one high-level constitutional body dealing with all matters relating to elections. This view has also been supported by the Electoral Supervisory Commission/Electoral Boundaries Commission. We accordingly recommend that the two bodies be merged and this new body be called the Electoral Supervisory and Boundaries Commission, with the necessary constitutional amendments being made.

84. The Chairman and the Members of the Electoral Boundaries Commission and the Electoral Supervisory Commission have always functioned on a part-time basis. While functioning in the aforesaid capacity, they continue to have their own professional obligations. They normally meet only once or twice a month, except at the time of elections when they meet on a daily basis to attend to their responsibilities as members of the said Commissions. The Electoral Supervisory Commission during discussions with us suggested the idea of a permanent Commission with a whole time Chairman and two whole time members; the other members could be co-opted on part time basis as and when the need arises, particularly during the time of elections. We feel that three member whole time Commission may be a too high powered body which may not be required keeping in view the size of Mauritius and the number of electors registered for the poll. We, however, feel that keeping in view the constitutional responsibilities of the Commission and the enhanced role being envisaged for it in our report, the proposed Electoral Supervisory and Boundaries Commissions, as recommended above, should be a permanent body with a whole time Chairman but the members may continue to function on part time basis. The whole time Chairman of the Commission should be a person of proven ability, competence, excellence

and impeccable integrity and widely recognised as such. The incumbent to the post should be a person of the status of a Judge of the Supreme Court and should be appointed till the age of superannuation of the Judge of the Supreme Court presently 62. We would therefore recommend that the proposed merged body, namely, the Electoral Supervisory and Boundaries Commission should have a permanent Chairman of the status of a Judge of the Supreme Court and the body may continue to have part time members as per the present dispensation.

85. We were informed that presently the Secretary of the Electoral Supervisory Commission/Electoral Boundaries Commission functions in these Commissions on a part time basis. We feel that in view of the more active role that the Commission is expected to play and as we are also recommending a permanent Electoral Supervisory and Boundaries Commission, with a whole time Chairman, the Secretary of this body should also be a whole time functionary and the incumbent of this post should not be entrusted with any other responsibility.

86. Presently, the Chairman and Members of the Electoral Supervisory Commission/Boundaries Commission are appointed for a term of five years as per the provisions contained in section 38 of the Constitution. They are also eligible for re-appointment for any number of times and there is no age of superannuation prescribed for them. We considered the aspects relating to the eligibility for re-appointment and age of superannuation as well as the suggestion received by us that these Commissions should consist of not less than five and not more than seven members, instead of not less than two and not more than seven members as at present provided in the Constitution. We feel that in the interest of having the services of eminent personalities, with experience, competence and integrity, as members of the Commission, it may not be appropriate to prescribe the ineligibility criteria for re-appointment and age of superannuation. We also feel that the present composition of not less than two and not more than seven members of the said bodies is appropriate in order to keep these bodies really representative of the various interests and groups in Mauritius.

87. The Electoral Supervisory Commission/Electoral Boundaries Commission have no office building of their own. Presently the Secretariat of these Commissions operates from the State House where the Secretary of the Commission is currently posted. The meetings of the Commission have invariably been held at the offices of the respective Chairman and of the Electoral Commissioner. We feel that this is a highly unsatisfactory arrangement to have for the independent constitutional bodies. We were also informed that these Commissions do

not have any permanent staff of their own and the administrative duties of both the Commissions are performed by officers posted at the Office of the President against payment of a nominal allowance for additional duties performed. This is also not a satisfactory arrangement. We would strongly recommend that the proposed Electoral Supervisory and Boundaries Commission, with a whole time Chairman and whole time Secretary, should have its own office accommodation and permanent staff exclusively to discharge administrative duties in the Commission.

88. The Electoral Supervisory Commission and the Electoral Boundaries Commission were allocated a budget voted by the National Assembly for the first time for the financial year 1996-1997. This budget is however provided in the budget head of the Prime Minister's Office. In order to safeguard the independence of the Commission, we would recommend that the budgetary requirements of the Commission should be a charged expenditure, and not voted by the Assembly, and it should be provided under a separate budget head. After the budget has been provided for, the Commission should be fully competent to operate it without any approval/clearance from any other authority.

89. Similarly, the budget of the Electoral Commissioner's Office is also provided in the Budget Head of the Prime Minister's Office. The budget of the Electoral Commissioner's Office should also be charged and not voted. After the budget has been provided for, the Electoral Commissioner should be competent to operate the budget within the overall control of the Electoral Supervisory Commission.

Delimitation of the Constituencies

90. Under Section 39 (2) of the Constitution, the Electoral Boundaries Commission has the duty to review the boundaries of the constituencies every ten years and to present a report to the National Assembly. A proviso to Section 39 (2) of the Constitution stipulates that the Commission may at any time carry out a review of the boundaries of the constituencies and present a report to the Assembly if it considers it desirable to do so by reason of the holding of an official census of the population of Mauritius.

91. The guiding principles to be followed by the Electoral Boundaries Commission while reviewing the boundaries of the constituencies are contained in Section 39 (3) of the Constitution. The basic guiding principle is that the number of inhabitants of each constituency should be as nearly equal as is reasonably practicable to the population quota (the number obtained by dividing the number of inhabitants by 20). However, the number of inhabitants of a constituency may be greater or less than the population quota in order to

take account of means of communication, geographical features, the density of population and the boundaries of administrative areas. In regard to the first delimitation of the constituencies in 1966, the boundaries of the already existing 40 electoral districts formed the basis of delimitation and each of the 20 Constituencies was delimited by clubbing together two existing electoral districts. Subsequently, the Electoral Boundaries Commission has reviewed the boundaries of the constituencies thrice namely in 1976, 1986 and 1999.

92. Under Section 39 (4) of the Constitution, the Assembly may, by resolution, approve or reject the recommendations of the Electoral Boundaries Commission but may not vary them; and, if so approved, the recommendations has to be given effect as from the next dissolution of Parliament. We were informed that the recommendations contained in the 1976 Report of the Electoral Boundaries Commission were rejected by the Assembly. The 1986 and 1999 Reports of the Electoral Boundaries Commission were approved by the Assembly.

93. As per the present delimitation of the constituencies based on the 1999 Report of the Electoral Boundaries Commission, the number of electors for the year 2001 in each constituency is as follows:

“

<i>No.</i>	CONSTITUENCY <i>Name</i>	<i>No. of Electors</i>
1	Grand River North West and Port Louis West	37,137
2	Port Louis South and Port Louis Central	24,484
3	Port Louis Maritime and Port Louis East	22,779
4	Port Louis North and Montagne Longue	41,370
5	Pamplemousses and Triolet	48,887
6	Grand Baie and Poudre d'Or	43,112
7	Piton and Rivière du Rempart	36,806
8	Quartier Militaire and Moka	37,077
9	Flacq and Bon Accueil	45,851
10	Montagne Blanche and Grand River South East	42,562
11	Vieux Grand Port and Rose Belle	35,299
12	Mahebourg and Plaine Magnien	33,526
13	Rivière des Anguilles and Souillac	30,764
14	Savanne and Black River	51,305
15	La Caverne and Phoenix	48,350
16	Vacoas and Floreal	40,566
17	Curepipe and Midlands	41,908
18	Belle Rose and Quatre Bornes	40,464
19	Stanley and Rose Hill	36,361
20	Beau Bassin and Petite Riviere	39,360
21	Rodrigues	21,947
	TOTAL	799,915”

It would be observed that there is a wide variation in the number of electors in respect of some of the constituencies which clearly goes against the basic principles contained in Section 39 (3) of the Constitution. These stipulate that the number of inhabitants in each constituency may as nearly be equal as is reasonably practicable to the population quota subject, of course, to certain criteria like means of communication, geographical features, density of population and the boundaries of administrative areas. Thus, in Mauritius Constituency No. 3, namely, Port Louis Maritime and Port Louis East, has the least number of electors with 22,779 while Constituency No. 14, namely, Savanne and Black River has the highest number of electors with 51,305. This wide variation of number of electors in the various constituencies was highlighted by various deponents before us. It was contended that such wide discrepancy in the number of electors amongst the constituencies needs to be redressed as this goes against the basic tenets of democracy. The last report of the Electoral Boundaries Commission submitted in 1999 is based on the 1990 census of population. The Commission was informed that 2000 census figures of population are now available. The Electoral Boundaries Commission can therefore undertake a fresh review of the boundaries of the constituencies based on the 2000 census, as per the provisions contained in the proviso to Section 39 (2) of the Constitution. Fresh delimitation of the constituencies appears necessary so that the Electoral Boundaries Commission appropriately addresses the issue of the wide variation in the number of electors in some of the constituencies. We would accordingly recommend a fresh delimitation of the Constituencies based on 2000 census of population at the earliest.

94. As indicated above, the recommendation of the Electoral Boundaries Commission can either be approved or rejected by the Assembly but these recommendations cannot be varied. It was under these provisions that the 1976 Report of the Electoral Boundaries Commission was rejected by the Assembly. Sitting MP's should not have the right to vote on proposals since they might have personal and political interests in preventing change. The Electoral Boundaries Commission is an independent constitutional body which makes its recommendations after thorough detailed review of the boundaries and after receiving written representations from interested parties, stakeholders, organisations and individuals. We would therefore recommend that the report of the Electoral Boundaries Commission should be given effect to. We feel that Section 39 of the Constitution should be amended to provide that the recommendations of the Electoral Boundaries Commission be made to the President who shall give effect to them.

Role of the Electoral Supervisory Commission

95. As already stated, the Electoral Supervisory Commission is the highest constitutional body vested with general responsibility for the registration of electors and conduct of elections and also for supervising the entire gamut of elections primarily conducted by the Electoral Commissioner. This body has not only to act independently and impartially but also to be perceived to be doing so in the eyes of the public. It has to play an important role so as to provide a level playing field to all the political parties and the candidates contesting the elections. It has to ensure that the party/alliance in power does not enjoy any undue benefit or advantage during the election process while being in office as a caretaker Government. It was in this context that we reviewed the role of the Electoral Supervisory Commission. We were happy to note that the perception in the various quarters in Mauritius has been that the Commission actually acts independently and impartially. However, with a view to further strengthening the role of the Commission and to provide it with necessary powers in order effectively to implement various election related measures, we make the recommendations that follow.

Fixing the time and date of the election

96. The present position is that after the dissolution of the National Assembly, or any seat of a member falling vacant, it is the President acting in accordance with the advice of the Prime Minister who decides on the timing and dates of the general elections or bye-election. In effect this means that it is the Prime Minister who decides the timing and the date of the poll. Thereafter, the decision is conveyed to the Electoral Supervisory Commission and the Electoral Commissioner, who act accordingly. This at times may work to the disadvantage of the political parties/alliance not in power

97. We feel that in order to provide a level playing field to all the political parties it should be the Electoral Supervisory Commission in consultation with the Electoral Commissioner which should be in a position to activate the electoral machinery for the holding of general elections or bye-elections. The date of the elections should therefore be fixed by the Electoral Supervisory Commission in consultation with the Electoral Commissioner. No other authority should have a role in this regard.

Maximum period for run-up to the Elections

98. As per the existing provisions, a bye-election can be held within a minimum period of 30 days and maximum period of 240 days. Similarly, the general elections can be held within

a minimum period of 30 days and maximum period of 150 days. When to hold elections within these time limits, depends entirely on the discretion of the Prime Minister.

99. We feel that the maximum period prescribed for holding of a bye-election or a general election is too long. We feel that a maximum period of three months for the holding of a bye-election or general election would be appropriate. We therefore recommend that general elections or a bye-election should be held at a time to be determined by the Electoral Supervisory Commission, in consultation with the Electoral Commissioner, within a minimum period of 30 days and a maximum period of three months from the dissolution of the Assembly or from the date the vacancy arose. If for any compelling reasons elections cannot be held within the maximum prescribed period of three months, the Electoral Supervisory Commission in consultation with Electoral Commissioner, could extend this period.

Allocation of Air-Time

100. Presently it is the Mauritius Broadcasting Corporation, a State Corporation, which determines the Air-Time to be allocated to political parties contesting elections. In order to bring an element of equity, fairness and transparency in regard to allocation of Air-Time, we feel that allocation of Air-Time amongst various political parties should be determined by the Electoral Supervisory Commission in consultation with the Electoral Commissioner. The Mauritius Broadcasting Corporation should also be consulted on technical aspects. The allocation of Air-Time should be done in an equitable manner based on clearly prescribed principles/guidelines to be evolved by the Electoral Supervisory Commission, so as to ensure that all political parties including those in Opposition get a fair opportunity of making political broadcasts in connection with the elections.

101. Mauritius is also likely to have private broadcasters shortly. We recommend that a condition for the grant of licences to the private broadcasters should make it incumbent on them in the national interest to provide free time on an equitable basis for political broadcast. The allocation of Air-Time on private TV channels and radio should also be regulated by the Electoral Supervisory Commission. We would therefore recommend that the Electoral Supervisory Commission should formulate appropriate guidelines regarding allocation of Air-Time on Government controlled and private TV and radio broadcasters after evolving maximum possible consensus amongst the major political parties. We would however strongly recommend that political advertisements and canvassing for votes by political parties and candidates on the electronic media and radio should be banned and the Electoral Supervisory Commission should ensure compliance. The only exceptions would be regulated

party political broadcasts as above, and the normal canvassing of support by participants in current affairs programmes.

Appointment of Election Officers

102. Presently, the Electoral Commissioner prepares and recommends a list of public servants to the Electoral Supervisory Commission for approval of the names of such officers for appointment as Election Officers for discharging election duty. After approval of Electoral Supervisory Commission, the Electoral Commissioner submits the list to the Prime Minister's Office for the issue of letter of appointment.

103. We feel that the entire exercise in regard to appointment of officers on election duty should be done only by the Electoral Supervisory Commission and the Electoral Commissioner and no other authority should play any role in the matter. The Electoral Commissioner should continue to prepare and recommend the list of election officers for approval of the Electoral Supervisory Commission, who should issue the letter of appointment to the officials deputed for election duty.

Model Code of Conduct

104. Elections can be said to be festivals of democracy and the real celebration of such festivals comes during the campaign period, that is to say, during the period between the announcement of elections and the date of poll. Election campaigns of political parties and candidates, which gather momentum from the time the elections are announced, get into full swing as the date of poll draws near. To woo the electors, public meetings, processions, rallies, house-to-house visits, personal contacts by the political parties/candidates and their workers and supporters, become the order of the day. Multi-dimensional hoardings, gates and arches on highways and busy intersections, banners, buntings, placards, posters and wall writings in various localities, streets and villages, soliciting votes for different symbols and candidates, become a common sight. During this period, the law and order machinery has also to gear itself to maintain a peaceful atmosphere conducive to the holding of free and fair election.

105. What is important during the campaign period is that all political parties and candidates show mutual respect for the rivals' viewpoints and make only constructive criticism of their policies and programmes, and do not allow campaigns by their enthusiastic, sometimes over-enthusiastic, workers and supporters to degenerate into bouts of mud-slinging and personal attacks and character assassination. Any deviation from the path of

decency may result in violent confrontations and street fights vitiating the atmosphere of friendly rivalry, so very necessary for the conduct of a free, fair, smooth and peaceful election. In order that the election campaigns of all political parties and candidates maintain high standards of public morality, in a true democratic spirit and that the various activities during the campaign period cause least inconvenience and irritation to the general public, it is necessary that there should be a Model Code of Conduct which the parties and the candidates should observe during the campaign period. The Model Code of Conduct should be evolved by the Electoral Supervisory Commission after maximum possible consensus has been arrived at with all the major political parties in Mauritius.

106. The Model Code of Conduct may cover the following aspects:-

- (i) it should lay stress on certain minimum standards of good behaviour and conduct of political parties, candidates and their workers and supporters during the election campaigns;
- (ii) it should deal with and regulate the holding of public meetings, processions by political parties and candidates, including the suggestions made by the Commissioner of Police that the holding of public meetings of a political nature be covered under the Public Gathering Act and the application to the police for the holding of the public meeting be accompanied by the written authorisation of the person or authority owning, occupying or administering the premises on which the meeting is to be held;
- (iii) it should regulate the pasting of posters and placing of banners so as to confine them to appropriate places;
- (iv) it should prescribe how political parties and candidates should conduct themselves on the polling day and at the polling booths;
- (v) it should deal with the conduct of the party/alliance in power so as to ensure that it does not enjoy any undue advantage over other political parties and candidates. The idea should be that the party/alliance in power which continues to govern as a caretaker Government during the campaign period, and the other political parties should have a level playing field. Some of the important aspects in this regard that could be incorporated in the Model Code of Conduct could include the following:

- (a) It has to be ensured that the party/alliance in power does not use its official position for the purpose of its election campaign and in particular: (i) Ministers should not combine official visits with electioneering work and should not also make use of official machinery or personnel for electioneering; (ii) Government transport, machinery and personnel should not be used for furtherance of the interest of the party in power;
- (b) Public places for holding election meetings should not be monopolised by the party/alliance in power;
- (c) The issuing of advertisements at the cost of the public exchequer in the newspapers and other media, and the misuse of official mass media during the election period for partisan coverage of political news and publicity regarding achievements with a view to furthering the prospects of the party in power should be scrupulously avoided;
- (d) Ministers and other authorities should not sanction grants/payments out of their discretionary funds during the campaign period;
- (e) Ministers and other authorities should not announce any financial grants in any form or promises thereof, lay foundation stones etc. of projects or schemes of any kind, make promise of the construction of roads, provision of drinking water facilities etc. or make any ad hoc appointments in Government, public companies etc., which may have the effect of influencing voters in favour of party/alliance in power.

107. We recommend that adequate provision be made in the Representation of the People Act to empower the Electoral Supervisory Commission to formulate the Model Code of Conduct, which once published by way of Regulations should have the force of law. The provisions of the Model Code of Conduct should be made binding on the political parties and the candidates, and violations thereof should be visited with appropriate penalties to be imposed by the Electoral Supervisory Commission. Appeal against such orders of the Electoral Supervisory Commission should lie to the Supreme Court.

Election Expenses

108. A ceiling is imposed on the expenses to be incurred by each candidate in respect of expenses. The maximum amount of election expenses that can be incurred in respect of a candidature as per the provisions contained in Section 51 of the Representation of the People Act is as follows:

- (a) In respect of a Legislative Assembly election –
 - (i) where the candidate does not belong to any party, or there is no other candidate belonging to the same party at the election in a constituency, 250,000 rupees;
 - (ii) where the candidate is not the only candidate belonging to a party at the election in a constituency, 150,000 rupees;
- (b) in respect of a municipal council election, 50,000 rupees.

109. The election agent of every candidate has to submit a financial return (duly sworn before a Magistrate) to the Electoral Commissioner within six weeks after the proclamation of results.

110. It is common knowledge that these ceilings on expenditure are observed only in their breach. Gross violations take place and false returns of expenses showing all expenditure within these ceilings are filed with impunity, everybody fully conscious of the fact that these returns do not reflect the true picture. Besides, expenditure by the political parties on behalf of the candidates in their constituencies and expenditure by the friends, associates etc. of the candidates is not covered within the prescribed ceilings. This is a big loop hole in the law and in fact makes a mockery of the whole issue of placing ceilings on expenses.

111. We feel that the presently prescribed ceilings on expenditure are totally unrealistic. The ceilings would therefore need upward revision to a reasonable and realistic level so as to match the cost of election. The ceilings for party as well as independent candidates should be the same, but the ceiling should cover all expenditure incurred by the candidate in his or her constituency including the amount incurred by the party and friends and associates of the candidates.

112. We would also recommend that the returns of election expenses should be filed by the candidates with the Electoral Supervisory Commission within 4 weeks of the completion of the poll. Thereafter, the Commission should make these returns public within the next two weeks. After publication of these returns, a maximum period of 21 days should be provided for any one to challenge any election expenses return and for filing of an election petition on that ground before a Court. Where satisfied that a candidate has not adhered to the prescribed ceilings, it should be the duty of the Commission to apply to the Court seeking annulment of the election.

Election Observers

113. We received suggestions for the appointment of observers including international observers at the time of elections in Mauritius. While the suggestion for appointment of international observers was made by very few deponents, the suggestion for appointment of observers from within the country was widely favoured. We also feel that while the presence of international observers would always be welcome, the appointment of international observers for elections in Mauritius would not seem to be necessary as the whole electoral process in Mauritius is now well entrenched and supported by healthy democratic traditions. However, the circumstances may warrant appointment of observers from within the country in certain constituencies. We would recommend that the power to appoint such observers should rest with the Electoral Supervisory Commission which could appoint such observers in such constituencies as may be considered necessary and appropriate keeping in view the prevailing situation and circumstances.

Securing a level playing field for elections

114. Terms of Reference (b) calls upon the Commission to -

"review all practical aspects relating to the holding of elections and make recommendations for greater transparency and for securing a level playing field for competing parties;"

115. Broadly speaking, the general perception in Mauritius appears to be that the elections which are conducted and supervised by the two main electoral management bodies, viz., Electoral Supervisory Commission and Electoral Commissioner, command the trust of the electorate. It is, however, felt that in order to ensure that people's trust in the electoral system continues to be retained, the electoral system and procedures need to be constantly reviewed and monitored. They must continue to reflect the needs and aspirations of the people in a dynamic democratic society. The Commission reviewed all practical aspects

relating to the holding of elections in Mauritius and considered the following changes in the system with a view to securing a level playing field for competing parties/alliances and the candidates. The objective is always to reinforce guarantees of free and fair elections.

Registration of Electors

116. The Registration of Electors is an important step in the democratic process because the Constitution guarantees to every citizen the right to vote only if he or she is registered as an Elector in a particular constituency. No person can be registered as a elector in any year unless he or she has attained or will have attained the age of 18 years on 15 August in that year. Every year the Electoral Registers are prepared on the basis of a house-to-house inquiry which is followed by publication of a provisional electors list. Thereafter, representations from interested parties regarding their claims/objections are considered and decided upon 15 days prior to the publication of the final list, which is called the Register of Electors. The Register of Electors, as finally published, comes into force on 16 August in that year and remains in force until the Register next compiled comes into force.

117. The disadvantage of the present system is that if elections are held after 16 August, any person who has attained the age of 18 years after 15 August will not be entitled to vote as his or her name will not appear on the Register until the next registration exercise is completed and takes effect on the 15 August of the following year. Further the procedure based on a house-to-house inquiry depends on the canvasser necessarily visiting every household in Mauritius in order to register eligible electors. The absence of some householders at the time of canvass inevitably results in names being deleted and the electors being disenfranchised. Various deponents also highlighted that on the day of the poll quite a large number of electors find that their names are not on the Register of Electors and consequently they are denied their right to vote. To overcome these difficulties, we are of the view that the registration of electors should be a continuous process and any person wanting to register as an elector at any time could make an application to the Electoral Officer who should decide on the application after inviting objections/suggestions thereupon. This continuous process of registration could continue till the date the Writ of elections is issued.

118. In order to identify voters for registration purposes, the Electoral Commissioner has recourse to publication in the press and the use of video clips on television to encourage eligible electors to come forward for registration. While these initiatives are laudable, we are in full agreement with the suggestion made by the Electoral Supervisory Commission that registration methods need to be further strengthened. We would suggest that a campaign of

voluntary registration should be started in educational and/or industrial institutions. Other means to encourage registration of voters like the Civil Status Office and National Identity Card Unit could also be considered. Voter education in general should also be developed and encouraged. At the end of the day, however, we believe that registration of voters should be compulsory, and that legislation should be adopted requiring all persons eligible for the vote to ensure that their names are on the current register.

Use of National Identity Cards

119. With a view to preventing impersonation of electors and facilitating identification at the time of the poll, it is necessary that the elector is able to establish his/her identity with an accepted document. Such identification appears necessary for voting integrity and for public perception even if not to combat real risks of impersonation. It therefore appears necessary to provide that electors coming to the polling station for casting their vote should show a specified acceptable document to prove their identity.

120. In Mauritius, every citizen possesses a National Identity Card issued by the Government. Production of this identity card by the elector at the time he/she comes to cast his/her vote should be made mandatory. The National Identity Card is a reliable form of identification and its production at the time of the polling would also establish that the elector is duly registered. The Card would eliminate the risk of impersonation as it includes several identifying features such as photograph, date of birth, signature etc., which would establish that the elector is who he/she purports to be. A number of deponents pointed to the danger that unscrupulous persons might 'rent' possession of Identity Cards so as effectively to bribe known supporters of their opposition not to vote. We believe such behaviour should be met by the Code of Conduct and the Criminal Law

121. Besides Mauritius citizens, Commonwealth citizens who have sufficient period of residence, also qualify for voting. They do not, however, possess the National Identity Card as the Card is issued only to Mauritian citizens. It is felt that such Commonwealth citizens should be called upon to produce their National Passports at the time of the voting. Besides, there could be cases where the voter is unable to produce a National Identity Card or Passport at the time of the voting. In such cases he/she should be allowed to cast his/her vote on production of some other document like a Driving Licence etc. to establish his/her identity.

122. The above measure of making production of the National Identify Card, Passport or some other document to establish the identity of the voter as mandatory, will -

- (i) eliminate fraud and personation;
- (ii) eliminate the need to write the elector's number on the counterfoil of the ballot paper issued to him, thereby also eliminating the elector's suspicion or fear of being identified, resulting in the violation of the secrecy of the vote;
- (iii) minimise or eliminate the use of "Questions put to Voters";
- (iv) help the office of the Electoral Commissioner to save considerable time and manpower since the office will no longer need to have recourse to
 - (a) the Civil Status Office to obtain and process lists of deceased persons;
 - (b) the Passport and Immigration Office to obtain and process lists of persons leaving the country;
 - (c) the Mental Hospital to obtain and process lists of inmates; and
 - (d) the Commissioner of Prisons to obtain and process lists of persons in jail.
- (v) facilitate the use of Electronic Voting Machines when, as we recommend, they are introduced.

123. In the light of the above, the Commission recommends that the production of the National Identity Card by Mauritian citizens or National Passport by the Commonwealth citizens at the time of casting of their vote should be made mandatory. If, for any reason, the elector is not able to produce either the National Identity Card or the Passport, his identity on the basis of some other similar document like driving licence etc., could be established.

Electronic Voting Machines

124. Presently, voting in Mauritius takes place by the conventional Marking System through the use of the conventional ballot boxes (transparent boxes) and the ballot papers. There are certain inherent problems in the conventional Marking System. A large number of ballot papers have to be printed for a countrywide General Election involving, among other things, vast consumption of paper, which is a scarce commodity. In addition, printing of the

ballot papers involves huge financial expenditure. A large number of ballot boxes are also required and their storage and upkeep during the non-election period poses serious administrative and security questions.

125. To overcome the above mentioned problems, the authorities in Mauritius have already been considering the use of Electronic Voting Machines for recording of the votes instead of the conventional method of use of ballot boxes and ballot papers. Electoral Voting Machines would make voting easier for electors who would only need to press appropriate buttons to indicate their choices. Use of ballot boxes and the cost involved for their conveyance and storage would be obviated, resulting in considerable savings. In case the Electoral Voting Machines are used, administrative arrangements required for conveyance of the ballot boxes from regional centres to the counting centres and for keeping them under Police and Special Mobile Forces till the counting the next day would be saved. With the use of Electoral Voting Machines, the results of the poll can also be known within a very short time after the close of the poll, thus sparing the Police, Electoral Commissioner's office, political parties and candidates unnecessary suspense and tension. The counting through the Electoral Voting Machines can thus take place immediately after the poll on the same day.

126. Electronic Voting Machines are being used extensively in India. We were informed that such Electronic Voting Machines are also used in some parts of France. The machines being used in India have on display all the essential features in respect of any candidate as are presently indicated on the ballot paper, namely, the name of the candidate, the name of the party and the election symbol. Even illiterate voters find no difficulty in casting their votes through the medium of these machines by pressing the appropriate button next to the symbol of the candidate as indicated on the machine.

127. In India, doubts have on occasion been expressed about the security aspects of the machines and whether these could be manipulated and tampered with by hackers. Such doubts have been found to be unsubstantiated after detailed examination of the machines by technical experts. The security aspects of the machines have also stood the test of scrutiny by the Courts. Before the start of the poll, a mock poll is held on these machines at every polling station in the presence of the candidates and their political agents so as to demonstrate that the machines are in perfect order, free from any defect or doubt. There are also provisions for proper safety/sealing mechanisms to ensure the machines are tamper-proof from the time of the poll to the time of the counting of votes and declaration of results.

128. In the light of the above and in the wake of the decision of the Mauritius Government to make Mauritius a Cyber Island, the Commission recommends that Electronic Voting Machines should be introduced in Mauritius as soon as possible. However we would further recommend that that be done in a phased manner, perhaps starting with few polling stations or constituencies and later on extended to all. Before the introduction of the machines, appropriate training must be given to the election staff, and the voters must also be fully familiarised with the use of the machines by intensive voter education programmes.

Election Deposits

129. The present prescribed ceilings of deposits for the candidates for contesting the elections is as under:-

- (i) Rs 250 for National Assembly Elections.
- (ii) Rs 100 for Municipal Council Elections.
- (iii) 'Nil' for Village Council Elections.

130. It is felt that the amounts for deposits are too low. Such low deposits encourage frivolous and not so-serious candidates jumping into the electoral fray in a light-hearted manner and without any serious intent to contest elections. This complicates the ballot papers unnecessarily. More seriously, there is a tendency on the part of certain frivolous candidates to extract certain benefits from other political parties/candidates for withdrawal of their nomination from the election contest, bringing the whole process into disrepute. Therefore, there would seem to be enough justification for increasing the deposits. In the case of the UDM versus Governor-General and others, the Supreme Court in its judgement of 14th June 1990 held that the principle of a deposit cannot per se be faulted to the point of being unconstitutional, but the increase of the deposit to the level of Rs 10,000 should be set aside by the Court on the ground that such a high amount was in the nature of an additional qualification relating to property on the candidates. This judgment makes it clear that a reasonable increase in the level of deposits can be considered. We would therefore recommend that the size of deposits required for filing of the nomination could be increased as follows:-

- (i) Rs 2,500 for National Assembly Elections.
- (ii) Rs 1,000 for Municipal Council Elections.

Address of Election Agent

131. At present, the address of an election agent has to be within the electoral area in which the person stands as a candidate. The agent who does not reside within that electoral area has to state "C/o an address within the said electoral area". With modern means of communication, the address of the election agent need not be within the electoral area concerned and we recommend that the Regulations be modified in this respect.

Withdrawal of Candidature

132 A period of 7 days has been prescribed within which a validly-nominated candidate can withdraw his/her candidature. The facility of withdrawal is provided to the candidate to enable him/her to decide whether finally to contest the election or not, knowing who the other likely contestants are. However, it is felt that the period of 7 days is too long and facilitates bargaining for certain undue gains/favour as a price for withdrawal. A maximum period of 2 days for the withdrawal of a nomination would appear to be reasonable and accordingly the Regulations be modified in this respect.

Hours of Poll

133. At present, the hours of poll for the National Assembly, Municipal Council and Village Council Elections are as follows:-

- (i) for National Assembly Elections
 - (a) **in Mauritius:** from 6.00 a.m. to 12.00 noon and from 1.00 p.m. to 6.00 p.m.
 - (b) **in Rodrigues:** from 5.30 a.m. to 12.00 noon and from 1.00 p.m. to 5.30 p.m.
 - (c) **in Agalega:** from 6.00 a.m. to 10.00 a.m.
- (ii) for Municipal Council Elections: from 6.00 a.m. to 12.00 noon and from 1.00 p.m. to 6.00 p.m.
- (iii) for Village Council Elections: from 7.00 a.m. to 12.00 noon and from 1.00 p.m. to 4.00 p.m.

134. The Commission heard that the prescribed hours of poll are too long, and that the lunch hour break causes lot of inconvenience as the entire poll process gets interrupted resulting in unnecessary administrative/paper work with regard to the sealing of the ballot papers, ballot boxes etc. The Commission feels that the hours of the poll could be prescribed on a uniform basis as 7.00 a.m. to 5.00 p.m. for all elections without any break, except for

Agalega, where the hours of poll could be from 7.00 a.m. to 11.00 a.m., except of course till the Electronic Voting Machines are introduced in Agalega also.

Counting of Votes

135. After the poll, the ballot boxes are transported on the same day from the polling stations to the Regional Centres and thereafter to Central Counting Stations set up for each electoral area. Counting of votes takes place at the Central Counting Stations on the day following the date of the poll from 8.00 a.m. onwards. The Commission received number of suggestions to the effect that counting should take place immediately after the close of the poll on the poll day itself. This measure will no doubt help to avoid transportation of ballot boxes containing ballot papers from polling stations to a central counting stations, thus saving considerable money, time, manpower and eliminating 'suspicion' amongst candidates, agents and the public at large about any foul play/mischief in respect of ballot boxes after the poll. Transportation of the ballot boxes to the central counting stations itself requires lot of administrative arrangements and vehicles. The Commission was informed that for the last general elections to the National Assembly a fleet of 123 vehicles had to be requisitioned for the transportation of the ballot boxes.

136. While there was wide support to the suggestion for counting of votes on the same day, the Electoral Supervisory Commission was of the view that this may not be possible for security reasons under the present arrangements, but counting on the same day could be envisaged only after the Electronic Voting Machines have been introduced in Mauritius. We, however, feel that there are strong advantages in having counting of votes on the same day immediately after the poll even under the present system of voting with ballot papers. We therefore recommend that the counting of polls should take place at each polling station immediately after the close of the poll on the poll day itself. The Senior Presiding Officer of the polling station should be made responsible for counting of votes for his/her polling station. The Senior Presiding Officers should be given the requisite training for the purpose. The result of counting at each polling station should be conveyed immediately by the Senior Presiding Officer to the Returning Officer.

137. To sum up, after the introduction of the Electronic Voting Machines for recording of the votes, there would be no difficulty in having the results of the poll on the Electronic Voting Machines immediately after the poll. Until, however, the Electronic Voting Machines are put in use in Mauritius, the Commission would recommend that the counting should take place at each polling station after the poll on the polling day itself. This would have the added benefit of enabling election results to be made known far more swiftly than at present.

Incapacitated Voters

138. At present, the procedure for assisting incapacitated voters requesting assistance is different for the 3 elections and is as follows:-

- (a) for National Assembly Elections, 3 Election Officers should assist the voter;
- (b) for Municipal Council Elections, 2 Election Officers should assist the voter;
- (c) for Village Council Elections, either 2 Election Officers should assist the voter; or he can be assisted by a "companion".

139. In order to avoid the 'involvement' of Election Officers in assisting such voters and to ensure the secrecy of the vote, the Commission recommends that in all elections, each incapacitated voter should be accompanied by a "companion" of his/her choice.

Returning Officers

140. Presently, the Electoral Officers under the Electoral Commissioner are appointed as Returning Officers for the elections. This does not appear to be a neat arrangement and also puts unnecessary burden on the Electoral Officers who have to perform other duties relating to the supervision of elections. We recommend that persons other than the Electoral Officers should be appointed as Returning Officers by the Electoral Commissioner with the approval of the Electoral Supervisory Commission.

Prohibition of Public Meetings etc. during the period of 48 hours ending with the hour fixed for conclusion of poll

141. To prevent undue excitement and unruly behaviour on the eve of the polls, we recommend that campaigning in the form of public meetings, processions, etc., except for door to door contact with the electors, should be prohibited during the period of 48 hours preceding the hour fixed for conclusion of the poll. Thus, if voting ends at 5.00 p.m. on Sunday, public meetings should finish by 5.00 p.m. on the preceding Friday.

Publication of Opinion Poll

142. In order to prevent them from having an undue influence on voter choice, we recommend that publication of opinion poll during the period of 48 hours ending with the hour fixed for conclusion of the poll should be prohibited.

Transportation of Electors

143. Presently, the candidates and political parties provide transport to electors going to the polling stations to cast their votes. This is not a correct electoral practice and could lead to influencing the voters in the exercise of their franchise. Such a practice is not permitted in countries like India and England. In fact it is an electoral offence to provide transport to the electors for going to the polling stations for casting their votes. We recommend that organised provision of transport by the political parties or candidates for transportation of the electors for going to the polling stations to cast their vote should be prohibited and also made an electoral offence.

Qualification of electors

144. Under the provisions of Section 42 of the Constitution, the Commonwealth citizens who have been residing in Mauritius for a period of not less than two years immediately before such date as may be prescribed by Parliament, are along with Mauritian citizens entitled to be registered as electors. Normally, in most countries, it is only the citizens of that country who are entitled to exercise their franchise. The Commission feels that in future only Mauritian citizens should be entitled to be registered as electors and Commonwealth citizens should not be registered as electors. However, Commonwealth citizens already registered as electors at present should be allowed to continue to exercise their right to vote as long as they continue to be residents of Mauritius.

Persons entitled to vote by proxy

145. Section 38 of National Assembly Elections Regulations, 1968, specifies the category of persons who are entitled to vote by proxy. Sub-section (d) and (e) of Section 38 provides for proxy voting for certain category of public officers and reads as follows:

- “(d) any public officer who is an elector in Rodrigues and who is serving in the Island of Mauritius; and
- (e) any public officer who is an elector in any constituency in the Island of Mauritius and who is serving in Rodrigues”.

146. It will be observed that the members of the families of the public officers serving in Mauritius and Rodrigues are not entitled to vote by proxy. The Commission feels that the members of the families of these public officers serving in Mauritius and Rodrigues should also be entitled to vote by proxy, as is the position in regard to the family members of Ambassadors, High Commissioners or other principal representatives of Mauritius abroad.

147. Under the existing provisions, the facility of voting by proxy has not been provided for the public officers and the members of their families who are electors in any constituency of Mauritius and are serving in Agalega or for those electors in Agalega who are serving in Mauritius. It would seem to be just and appropriate to include such public officers and their families in the category of persons entitled to vote by proxy.

Persons entitled to admittance to the polling station

148. Under Section 72A of the Representation of the People Act, the following category of persons are entitled to admittance to the polling station:-

- (i) the Chairman and members of the Commission;
- (ii) an election officer;
- (iii) a candidate;
- (iv) a polling agent; and
- (v) a police officer on duty.

The aforesaid provision does not provide for the admittance of election observers at the polling stations. In case at any time election observers are appointed, it may be appropriate to entitle them to admittance to any polling station as this would enable them to discharge their responsibilities as election observers in a proper manner. It is felt that Section 72A needs to be amended accordingly so as to provide for the admittance of election observers at polling stations.

Restructuring of the Electoral Commissioner's Office

149. In the discharge of Constitutional responsibilities relating to electoral process, the Electoral Commissioner is assisted by the Chief Electoral Officer, Principal Electoral Officer and two Senior Electoral Officers. There are also 10 Electoral Officers, one for every two constituencies (one for three constituencies including Rodrigues). All the 10 Electoral Officers are presently stationed at the headquarters in the Electoral Commissioner's Office. The Electoral Commissioner suggested that it may be appropriate to set up regional offices in each constituency for better service to the electorate, thus the strength of the Electoral Officers will have to be increased from 10 to 21. This indeed is a welcome suggestion and would bring the registration officers nearer the electors instead of their having to travel to the Electoral Commissioner's Office for registration. We would, however, suggest that there be further discussion with the Electoral Supervisory Commission as to whether there should be one Electoral Officer for each constituency or, alternatively 10 Regional Offices, catering for

two constituencies each, headed by an Electoral Officer, with one regional office being established in Rodrigues would suffice.

Destruction of election documents

150. Presently, election documents can be destroyed only after a period of 12 months in respect of the National Assembly and Municipal Council elections, while the records of the Village Council elections can be destroyed after six months. The Electoral Commissioner made a suggestion that all election records could be destroyed on a uniform basis after a period of three months from the date of any election, provided if in respect of any election, an election petition has been filed in the Court, the records will have to be preserved till the final decision of the Courts. We would support this suggestion.

Printing and storage of ballot papers

151. Ballot papers are actually printed on ordinary paper at the Government Printing Press. While printing of this important document is in process, other printing works are normally carried out concurrently in the same press-room. We feel that there is a need to review completely the procedures for the printing of ballot papers until such time as Electronic Voting Machines may be introduced. The Government Printing Office should cater for the appropriate infrastructure for the printing of ballot papers. During the printing of ballot papers, the area where such activity takes place should be declared a "sterile area" and kept secured solely for the printing of ballot papers. We would also recommend that ballot papers should be printed on security paper that would include inter alia security features such as punched holes, watermarks etc.

152. Presently, after the elections the ballot papers are kept at the Special Mobile Force premises, Vacoas. We feel that it would be appropriate for the ballot papers to be kept rather under the custody of the Electoral Supervisory Commission at convenient place protected from dust, moisture and fire hazards.

Yard Agents

153. Under section 18 of the National Assembly Elections Regulations, 1968, in addition to the polling agents for each polling station, each candidate can also appoint not more than two polling agents (called Yard Agents) to be in attendance within the precincts of the polling station for the purpose of detecting personation. It was represented to us that there was no need for appointment of yard agents as Directing Clerks are appointed by the Electoral Commission to assist electors on their arrival at polling station and there should be no fear of impersonation once the production of National Identity Cards is made mandatory when

applying for a ballot paper. We agree with the suggestion and would recommend that there is no need for appointment of Yard Agents by the candidates.

Compulsory Voting

154. A few deponents made a suggestion to us that voting should be made compulsory in Mauritius, as in the position in some countries like Australia, Argentina etc. The idea, however, did not find favour with most representatives of political parties and other deponents who appeared before us. We also feel that voting need not be made compulsory in Mauritius.

"The 200-Metre radius"

155. As per the provisions contained in Section 65 of the Representation of the People Act, certain acts like setting up of an office in any room, building or place whatsoever for the purpose of any activity directed towards promoting or procuring the election of a candidate are prohibited within 200 metres of the precincts of a polling station. The 200-metre radius has to be measured from the precincts of a Polling Station. This may vary for different approach roads leading to the Polling Station, and has posed difficulties in the past. There is thus a need for a more explicit definition of the term 'precincts of a polling station' from where the 200-metre radius should start. It is felt that the word 'precinct' should be redefined to mean "main entrance to the Polling Station". Besides, there is also need to confer powers on the Returning Officer to adjust the 200-metre limit as and when the situation warrants, as it may happen sometimes that the 200-metre limit ends at the entrance of some private/public building or in the middle of the road. The permissible limit could be in the range of 150-200 metres from the main entrance of a Poling Station. The limit, once marked, may have to be proclaimed by the Electoral Commissioner.

CHAPTER THREE

PUBLIC FUNDING FOR AND THE REGISTRATION OF POLITICAL PARTIES

Term of Reference (c) requests the Commission to -
"propose a draft Public Funding of Political Parties Bill"

156. We attach the text of a proposed draft Public Funding of Political Parties Bill as **Annexure C**. Normally, basic political decisions are taken about a measure and then draft legislation is elaborated. We have been invited to reverse the process, that is, to draft a Bill so as to provoke focussed political discussion. In accepting the challenge we wish to underline that the draft Bill which we annexe is based on a set of assumptions which we would support without necessarily being opposed to other approaches as to what the proper scope and structure of such a Bill should be. We do not offer what we consider to be a definitive text, but put forward a scheme which we regard as sufficiently coherent and motivated to serve as the basis for further elaboration.

157. In line with our terms of reference, we recommend the adoption of a law which would provide for the establishment of a Fund which will receive funds appropriated by Parliament and such other funds which it may lawfully received. Such funds will be administered by the Electoral Supervisory Commission, which shall allocate moneys –

- (a) to political parties represented in the National Assembly on the basis of –
 - (i) the number of members it has in the Assembly;
 - (ii) the percentage of votes cast in favour of its candidates; and
 - (iii) takes account of the number of women it has in the Assembly;
- (b) to elected candidates and those who although not elected have at an election scored 15% or more of the votes expressed in their respective constituency; and
- (c) before the election, to those parties which field in the 20 constituencies of Mauritius, 60 candidates, at least 20 of whom are women.

158. We have in other Chapters of this Report alluded to the fact that the major political parties or alliances should be encouraged to make room for women candidates. We have no doubt that should our recommendation concerning qualifying political parties receiving in advance from the Fund one third of the authorised expenses of their candidates for their

electoral campaign, such an "inducement", offered in strict equality to every political party of the Republic, may well lead their leaders to consider that there is no justification to hold that Mauritian women may not be as keen as other women of the world to share in public life at the highest levels.

159. Even though we were only concerned with public funding of political parties by the State, we have thought it necessary to recommend that Companies should only be allowed to make donations in favour of political parties through the Fund as created by law. Monies so donated by companies are to be distributed to no particular political party but to all those who would qualify for funding under the law. There is no need to insist on how powerful and rich corporations have, through financial pressure, tried the world over to influence those likely to exercise political decisions. This explains why many democratic countries have thought it wise to ban altogether any possibility of political patronage by powerful Companies. Suffice it to say that we had the advantage of receiving somebody who has exercised ministerial responsibility and who had the courage to invite us to recommend the banning of political patronage by the Chief Executives of important companies with shareholder's money. He remarked: "they never give something for nothing".

160. The draft Bill we have prepared concerns only public funding. Apart from preventing companies from making donations to political parties, except through the proposed public fund, it does not cater for private donations and contributions to political parties, which clearly must also be controlled. It will therefore have to be supplemented by further legislation to cater for donations by individuals etc.

161. We have pointed out in Chapter Two that whereas individual candidates at an election are not supposed to spend more than a certain sum fixed by law, there is, under present legislation, nothing which prevents any party from spending millions to promote its candidates. The sad truth is that all those who appeared before us readily accepted that this was actually happening in Mauritius. We therefore recommend that every political party should be made accountable to the Commission for its campaign expenditure for electoral purposes during the campaign period and that lavish overspending by any political party should henceforth invalidate the election of its candidates just as lavish overspending by any candidate exposes his/her election to the danger of being declared null and void.

Registration of Political Parties

162. At the moment nominal registration of parties is required simply for purposes of participation in election. If, however, public funding is to be provided for parties we believe that the question of registration of parties should receive special attention. Indeed, questions such as control of expenditure on elections, the implementation of anti-defection clauses, and access to public and private broadcasting, all require a certain degree of formalism and regularity for party registration. The parties contend for public favour in the public sphere with the objective of exercising or influencing the exercise of public power. In the view of the Commission, parties should function in an open manner, without secret headquarters, secret structures, secret personnel, and secret sources of finance. The Constitution guarantees freedom of association, which includes the right to take part in political life and elections. This does not prevent appropriate regulation of parties aimed at securing greater transparency and fairer competition of ideas.

163. The Registration of Association Act which offers to any non profit making association the possibility of being registered so as to become a body corporate, specifically excludes political parties from its ambit. Under the present legislation, a political party's registration with the Electoral Commission, under the provisions of the National Assembly Elections Regulations, may only be done a few days before a general election and serves only for the purpose of the first Schedule to the Constitution, namely the allocation of seats under the best loser system. It has therefore been thought necessary to recommend that any party intending to field candidates in an election and likely to benefit of any allocation of moneys from the State under the Political Parties Funding Act should, at any time, be able to seek registration as a party by the Electoral Supervisory Commission, which would have power to reject such an application where it appears to the Commission that the party functions in a manner which threatens the democratic and tolerant foundations of the nation. Any refusal to register would however be subject to an appeal to the Supreme Court.

164. Once registered, any political party will acquire corporate status and thus have all rights normally enjoyed by a moral person. It will also have to comply with some stringent requirements concerning its accounts.

CHAPTER FOUR

PROPOSALS CONCERNING THE JUDICIAL AND LEGAL SERVICE COMMISSION AND THE CREATION OF A SEPARATE APPELLATE DIVISION OF THE SUPREME COURT

The Judicial and Legal Service Commission

Term of Reference (g) calls for the Commission to -

"Review the composition of the Judicial and Legal Service Commission"

165. Ever since it was first established by the Constitution of 1964, the Judicial and Legal Service Commission which is responsible for the appointment of all the members of the Judicial Department (the Chief Justice and the Senior Puisne Judge excepted), the Director of Public Prosecutions and every officer of the Attorney-General's Department, including the Solicitor-General, has always been composed of the Chief Justice, as Chairman, and –

- (a) the Senior Puisne Judge;
- (b) the Chairman of the Public Service Commission; and
- (c) another member (referred to as the appointed member), a person who, by virtue of section 85 (2) of the Constitution, must be someone " who is or has been a judge of a court having unlimited jurisdiction in civil or criminal matters in some part of the Commonwealth or a court having jurisdiction in appeals from any such court ".

Apart from the late Sir Raman Osman, an ex Senior Puisne Judge who, before independence, was appointed by the then Governor, acting in his own deliberate judgment, to act as the "appointed member" of the Commission, all other members who have afterwards served as "appointed member" have been sitting Judges of the Supreme Court, who were, in accordance with section 85 (1) of the Constitution, appointed by the Governor-General and afterwards by the President of the Republic, "acting in accordance with the advice of the Chief Justice".

It is again, in accordance with the advice of the Chief Justice, that the Senior Puisne Judge is appointed by the President.

The “appointed member” who, as hinted earlier, was appointed by the then Governor acting in his own personal judgment before independence, must, since independence, also be appointed in accordance with the advice of the Chief Justice.

In the years 1991/1992, the then Chief Justice thought it wise to recommend to the President the appointment, for periods of one year only, of any Judge of his choice, including sometimes, the most junior or last appointed Judge, rather than the most Senior Judge taking precedence after the Senior Puisne Judge as had invariably been the case since the departure of Sir Raman Osman.

166. There has lately been wide and open criticism of quite a few decisions of the Commission and some persons have rightly or wrongly openly complained of what they perceived as the Chief Justice’s hegemony over the Commission through all the members appointed in accordance with his advice. We have also heard complaints about the Commission’s apparent failure to consult the Solicitor-General before making appointments to the latter’s office or transferring thereto certain members of the magistracy.

Some of these questions have already been considered by the Presidential Commission chaired by Lord Mackay to examine and report upon the structure and operation of the judicial system and legal professions in Mauritius. In paragraphs 5.1 to 5.11 of their report they made some terse comments about the appointment of Judges, Magistrates and State Law Officers and the membership of the Commission – see **Annexure G**.

167. The Honourable Chief Justice was one of the very first persons whom this Commission wanted to meet. He was able to receive us on 19 December, 2001 when he made it clear the he was resolutely against Lord Mackay’s recommendations in favour of the appointment of the Solicitor-General, a representative of the Executive whose mere presence, in the midst of the Commission, would, in his view, suffice to destroy the Commission’s acquired reputation for independence from the Executive.

The learned Chief Justice also considered that it would be improper for any Barrister-at-law to be a member of the Commission, since a Barrister in private practice was always likely to be called upon to appear before a Judge whom he would have previously recommended for appointment. He was again absolutely against the idea of any ex Chief Justice or former Judge being appointed to the Commission as “appointed member”. On the other hand, he had no objection to the continued presence, on the Commission, of the Chairman of the

Public Service to select, from a panel of distinguished and learned lawyers, the one most capable of ensuring incomplete independence and without fear or favour any post in the Judiciary. On 11 January 2002, the Chief Justice wrote to the Commission to reiterate his opposition to the appointment on either the new Court of Appeal or the Judicial and Legal Service Commission of any former Judge or Chief Justice most of whom are said to have, by their behaviour and action, not shown themselves to be completely independent from the executive and to have even, as he put it "played the tune of the Executive"!

168. The Commission has had the advantage of hearing evidence from quite a few persons on the question of the composition of the Judicial and Legal Service Commission. Amongst those so heard were two distinguished former Chief Justices, the Attorney-General, the Solicitor-General and some other senior members of the Attorney-General's office, a retired Judge, a former Solicitor-General as well as some senior members of the Bar, including no less than four ex Chairmen of the Bar Council. There seems to be unanimity on the need to review the present composition of the Judicial and Legal Service Commission, even if those who press for change do not necessarily agree on who should replace some of the present members.

169. The Commission is satisfied that if called upon to be a member of the Judicial and Legal Service Commission, the Solicitor-General would exercise whatever functions may be bestowed on him with no less independence from the Executive than those members of the Judiciary who, before being promoted to the Bench, also occupied positions of trust in the Executive.

After careful consideration of the present circumstances of Mauritius, the Commission, however, considers that one cannot dismiss the possibility that some persons may perceive the participation of the Solicitor-General as that of a representative of the Attorney-General of whose Office/Ministry he is the administrative head and responsible officer. Ever since 1964 it has generally been accepted that all appointments in the service were to be free of any possible interference from the Executive. Hence the creation of the various Commissions of which no Permanent Secretary or Responsible Officer has ever dreamt to be a member. It may therefore not be warranted to take any risk that the appointment of even the most junior Magistrate may be perceived to be dictated by the Executive even if, to the Commission's knowledge, the fact that the Chief Justice himself is appointed by the President, after consultation with the Prime Minister, has never been regarded as implying some political connotation to the different Chief Justices who have been at the head of the Judiciary since independence.

170. The Commission is on the other hand more than satisfied that the presence amongst the members of the Commission of an ex Chief Justice and, in case there is no ex Chief Justice who is prepared to act, the presence of an ex-Judge with experience and enjoying the esteem of the population, far from being likely to tarnish the reputation of the Judicial and Legal Service Commission should enhance the Commission's reputation for impartiality and independence from the executive. The Commission therefore recommends that the "appointed member" be appointed by the President of the Republic after such consultation as he thinks fit, the President being free to appoint an ex Chief Justice, an ex Judge or a sitting Judge.

171. The Commission strongly supports the recommendations of Lord Mackay about the desirability that one member of the private legal profession should be appointed to the Judicial and Legal Service Commission. The Commission would go even further than Lord Mackay and recommend that a senior Attorney should also be appointed. The Commission, however, considers that the members of the private legal profession should be appointed by the President of the Republic, after such consultation as he thinks fit, from a list of two and not more than three Barristers and Attorneys of not less than fifteen years standing, nominated by the Bar Council and the Law Society respectively.

172. The Commission therefore recommends that the Judicial and Legal Service Commission should be composed of –

- (a) the Chief Justice, as Chairman;
- (b) the Senior Puisne Judge;
- (c) two members of the private legal profession appointed for three years by the President of the Republic, from a list of not less than two and not more than three Barristers and Attorneys with not less than fifteen years standing or more, nominated by the Bar Council and the Law Society respectively; and
- (d) a person who "is or has been a Judge of a Court having unlimited jurisdiction in civil or criminal matter or a court having jurisdiction in appeal from any such court", appointed for a term of three years by the President of the Republic after such consultation as he thinks fit.

173. Although paragraph (g) of the Commission's Terms of Reference does, at first sight, limit us to "review the composition of the Judicial and Legal Service Commission" we consider that paragraph (i) of the same Terms of Reference reading –

- (i) report on any matters that are incidental or conducive to the attainment of the above objectives,

allows us to make some further comments/recommendations concerning the appointment of those Judges who are now appointed by the President, acting on the advice of the Judicial and Legal Service Commission, and the appointment of the Solicitor-General and the Director of Public Prosecutions two posts which, in the hierarchy, are equivalent to the office of a Judge and who are appointed by the Judicial and Legal Service Commission itself.

174. In paragraph 5.2 of their report the Mackay Commission recommend that both the Chief Justice and the Senior Puisne Judge should be appointed by the President acting in his own deliberate judgment after such consultation as he thinks fit, "since the Chief Justice has an important relationship to all the people of Mauritius and he must be completely independent of the Government". We are of the view that since all the Judges of Mauritius have the same important relationship to all the people of Mauritius, must be equally independent of the Government and are equal among themselves, the appointment of all the Judges of the Supreme Court should be made by the President after consultation with the Judicial and Legal Service Commission and such other persons as he thinks fit.

175. The same appointment procedure should be followed:-

- (a) for the Director of Public Prosecutions whose complete independence of the Government is, for democracy's sake, as vital as the independence of any Judge, even if the Judicial Committee of the Privy Council has held that the Director of Public Prosecutions belongs to the Executive;
- (b) for the Solicitor-General whose office is comparable to that of the Senior Puisne Judge and who, by the very fact that he is the Solicitor-General, has always been a more or less automatic choice for a post of Judge whenever, on occasion arising, he decides to apply for a post of Judge. Again, even if the Solicitor-General does no doubt belong to the executive, he must, as

pointed out in paragraph 5.19 of Lord Mackay's report "be seen as giving completely independent legal advice and legal services to the executive".

The creation of an Appellate Division of the Supreme Court

Term of reference (b) requests the Commission to –

"Separate the Appellate Division of the Supreme Court from other divisions".

Section 76 (1) of the Constitution provides that there shall be a Supreme Court for Mauritius which shall have unlimited jurisdiction to hear and determine any civil and criminal proceedings under any law other a disciplinary law and such jurisdiction and powers as may be conferred upon it by the Constitution itself or any other law.

Section 76 (2) provides that the Chief Justice, the Senior Puisne Judge and such number of Judges as may be prescribed by Parliament shall be the Judges of the Supreme Court.

Section 80 provides for a Court of Civil Appeal and a Court of Criminal Appeal each of which are to be a division of the Supreme Court and which shall have "such jurisdiction and powers to hear and determine appeals" as may be conferred by them by the Constitution or any other law". Section 80 (3) provides that the Judges of the Court of Civil Appeal and the Court of Criminal Appeal shall be the Judges for the time being of the Supreme Court.

The Court of Civil Appeal and the Court of Criminal Appeal referred to in Section 80 of the Constitution, are those established long before 1968 by the Court of Criminal Appeal Act and the Court of Civil Appeal Act which respectively provide -

- (A) in the case of the Court of Civil Appeal for an appeal against any judgment or order of a Judge sitting alone in the exercise in Court of his original civil jurisdiction;
- (B) in the case of the Court of Criminal Appeal for an appeal -
 - (a) by a person convicted before the Supreme Court against his conviction or sentence; and
 - (b) by the Director of Public Prosecutions against the imposition of any sentence by the Supreme Court.

176. Both Acts restrict the right of appeal against judgments of the Supreme Court to those cases when the Supreme Court exercises its original jurisdiction in criminal as well as civil matters. Further, where the Chief Justice, acting under the powers conferred upon him by Section 36 of the Courts Act, decides, either *proprio motu* or on the application of one of the parties, that a case should be heard by two or more Judges "having regard to the magnitude of the interests at stake or the importance or intricacy of the questions of fact or law involved" the right of appeal to the Court of Civil Appeal against a judgment of the Supreme Court, even in the exercise of its original jurisdiction, is baffled. The dissatisfied litigant has then but an illusory right of appeal to the Privy Council, a right which, given the costs involved is a luxury which few Mauritians can afford. The Supreme Court has already decided that the right to free legal aid does not extend to applications for an appeal to the Privy Council.

177. In paragraphs 3.1 to 3.6 of the Report of the Mackay Commission – see **Annexure G** - the Commissioners have already considered the need to set up "a Court of Appeal Section of the Supreme Court to which appeals from every level of court in Mauritius, the High Court Section of the Supreme Court, the Intermediate Court and the District Court should be taken" "and recommended that the said Court of Appeal Section "would have jurisdiction to hear all appeals from courts and tribunals in Mauritius and would be concerned with nothing other than appeals".

The Presidential Commission further recommended "that the new Court of Appeal Section should consist of the Chief Justice, who will continue to be the Head of the Judiciary, the President of the Supreme Court and the Court of Appeal Section of that Court. The other Judges should be the Senior Puisne Judge and the three next most senior Judges of the Supreme Court" "and was of the view that "a section of the Supreme Court staffed by fully serving senior Judges would be most likely to accord with the expectations of the legal profession and the public in Mauritius".

178. Given the wording of paragraph (b) of the Commission's Terms of Reference, namely, "Separate the Appellate Division of the Supreme Court from other divisions" it may be necessary to decide what the words "the Appellate Division of the Supreme Court" mean.

Section 82 (2) of the Constitution provides that an appeal shall lie to the Supreme Court from decisions of subordinate courts –

- a. as of right from any final decision in any civil proceedings;
- b. as of right from any final decision in criminal proceedings whereby any person is adjudged to pay a fine of or exceeding such amount as may be prescribed or to be imprisoned with or without the option of a fine;
- c. by way of case stated, from any final decision in criminal proceedings on the ground that it is erroneous in point of law or in excess of jurisdiction; and
- d. in such other cases as may be prescribed:

Section 69 (1) and (2) of the Courts Act , on the other hand, says the following about the Appellate jurisdiction of the Supreme Court –

(1) Subject to any other enactment, the Supreme Court shall have full power and jurisdiction to hear and determine all appeals, whether civil or criminal, made to the Court from –

- (a) a Judge in the exercises of his original jurisdiction;
- (b) –
- (c) the Bankruptcy Division;
- (d) the Registrar;
- (e) the Intermediate Court;
- (f) the Industrial Court;
- (g) a Magistrate;
- (h) any other Court or body established under any other enactment.

(2) An appeal to the Supreme Court under any of the enactments set out in the First Schedule shall be dealt with in the same manner as an appeal from a Magistrate pursuant to the District and Intermediate Courts (Civil Jurisdiction) Act, but the appellant shall not be required to furnish security.

179. It would seem that the reference to the Appellate Division of the Supreme Court as opposed to its Appellate jurisdiction, must mean the only appellate Division referred to in the Constitution, namely the Courts of Civil Appeal and Criminal Appeal in Section 80 of the Constitution.

This, however, cannot have been the intention of Government since the recommendations of Lord Mackay for the setting up of a Court of Appeal Section of the Supreme Court with the jurisdiction to hear all appeals from courts and tribunals in Mauritius and which would be concerned with nothing other than appeal seem to have been accepted by one and all.

This said, the Commission can hardly think of anything else which may be required to separate the said Appellate Division except of course to recommend that Section 76 of the Constitution be amended to provide for an Appellate Division which would cater for all appeals from the High Court as well as from the subordinate courts and of the Judges who would compose such division.

180. All the deponents accepted that the present situation in which the Supreme Court functions in a generic manner, is unsatisfactory. A major criticism was that colleagues frequently had to hear appeals against decisions given by other members of the Court. This could give rise to a perception amongst litigants that the Judges would be inclined, consciously or unconsciously, to stand by each other. Another drawback of the present arrangement was said to be that once two members of the present Supreme Court had heard an appeal, the only further appeal available lay to the Privy Council of the House of Lords in London. While the value of having such further recourse was appreciated, deponents felt that a strong Appeal Court in Mauritius would better meet the bill, reserving appeals to the Privy Council for such cases where the importance of the matter justified the expense and delays involved.

181. In discussions that the Commission had in the Chambers of the Chief Justice with all the members of the Supreme Court, the Chairperson of the Commission raised the possibility of using the creation of an Appellate Division to establish a particularly strong and prestigious Appeal Court. He projected the idea of an elite court that would not only hear appeals in the ordinary way, as suggested by Lord Mackay, but also serve as a constitutional and electoral court with jurisdiction to hear and respond expeditiously to important constitutional questions and serious electoral matters. Such a court could exert an hydraulic effect on the whole judiciary, serving both as a beacon for guiding the country's jurisprudence and as a desired destination for the most talented and enterprising lawyers.

182. The minimum that our terms of reference would require, if interpreted in the light of the Mackay Report, would be the creation of a separate Appellate Division functioning with an appropriate administration in its own physical space. The proposal in the Mackay Report that

the five most senior Judges of the Supreme Court would be the members of that court, provides a neat way of achieving the Court complement, and would be in line with the large degree of respect which Mauritian tradition has given to judicial seniority. If, however, advantage is taken of the opportunities arising from amending the Constitution, to establish a court intended to have a special prestige supplementing that presently enjoyed by the Supreme Court, then we believe that attention must be paid to two factors. The first is to draw upon the widest range of legal talent as a source of potential members. The second is to create material and other conditions that will be attractive to the best legal minds.

183. It is the view of the Commission that the establishment of such an elite court would do much to enhance the prestige of Mauritius and promote respect for the Constitution, democracy and the electoral process. In addition, it would add considerably in the eyes of the international community, international organisations, donors and investors, to the reputation of Mauritius as a country where the rule of law operates and where disputes can be settled in a principled way with expedition and sagacity. It is our view that such a court should be created by blending the present leadership core of the Supreme Court with a corps of distinguished lawyers drawn from other sources. The obvious person to head such court would be the Chief Justice. The Senior Puisne Judge would have a crucial role to play, either as deputy to the Chief Justice in the Appellate Court or as President of the High Court, with the right to sit in the Appeal Court in important constitutional and electoral matters. The major source of recruitment for the Appeal Court would be Judges with experience in the High Court, with special attention being paid to those who establish unusual merit by means of their conduct and the quality of their decisions.

184. A number of other potential sources for appointment were mentioned to us. One proposal was that Judges from other Commonwealth countries be employed. Another was to take account of the fact that the Civil Code had its origin in France rather than the Commonwealth and that accordingly consideration could be given to calling upon the services of a Judge from France or another country with the French Civil Code. While the Commission does not support the idea of employing retired Judges from other jurisdictions on contract, it is not in principle against inviting Judges presently sitting on courts in other countries to serve from time to time on the Appeal Court, in the same way as the Chief Justice of Mauritius helps out with the work of the court that hears appeals in the Seychelles. The Commission believes, however, that sufficient legal talent exists in Mauritius itself to constitute a strong and prestigious court of appeal. At present the retiring age for Judges is 62 (sixty two). The Commission recommends that if the contemplated Court of Appeal is established, the retiring age for members of that court could be raised to 72 (seventy two).

Attractive conditions of service should be created so as to encourage former Chief Justices and other retired Judges of the Supreme Court to consider nomination. In addition, the Solicitor-General should be considered as a potential candidate for direct appointment to the Appeal Court. Finally, distinguished members of the Bar with considerable experience who have shown outstanding talent should be eligible for appointment.

185. It is the view of the Commission that all appointments should be made by the President after consultation with the Judicial and Legal Services Commission and such other bodies or persons as he or she might deem appropriate. The Judiciary as a whole would benefit from having new members appointed in this way. The envisaged Court would take nothing away from the existing Supreme Court judges. On the contrary, it would hold out the prospect of their one day serving on a Court with even higher status and better conditions than they enjoy at the moment.

186. The Commission accordingly recommends the creation of an Appellate Division of the Supreme Court headed by the Chief Justice assisted by the Senior Puisne Judge and the strongest available legal minds in Mauritius, and serving as a court of appeal in civil and criminal matters as well as a constitutional court and a court for important electoral matters. Such a strong and independent court could do much to protect and enhance the values that underlie the Constitution and which we have sought to uphold in preparing this Report.

(Justice Albie Sachs)

Chairperson

(B. B. Tandon)

Member

(R. Ahnee)

Member

Port Louis

24 January 2002