The 'Best Loser System': An ingenious electoral system that helped Mauritius in maintaining peace in its multi-racial society or a system that institutionalizes racial division?

1. INTRODUCTION

Diversity in terms of religion, ethnicity, languages or culture is what gives the African continent its uniqueness. Indeed, 'African' is a term which encompasses all indigenous ethnicities of the African continent which amount to nearly 3000 distinct ethnic groups. In as much as this immense diversity should be a reason for celebration, it is unfortunately proving to be a reason for war and bloodshed on the black continent. It would be needless to enumerate all the massacres that have occurred in Africa on the basis of religion, race or ethnicity as by now they are notoriously famous. An unhappy and unsatisfied section of the population has often been at the root of several political, social and economic unrests in Africa. Only recently, it has been reported that Egyptian Coptic Christians face persecution in post Morsi Egypt which in fact has always been the case in Egypt.[1] The Coptic Pope Tawadros II of Alexandria, selected as head of the Coptic Orthodox Church in November 2012, has stated that former Egyptian President, Morsi, had intended to 'islamicize' the political system, purposely ignoring the Copts and preventing free expression of religious groups other than Islam.[2]

Slightly over two years since the Arab spring, ethnic conflict has been popular in the African Arab world. Libya, Tunisia, Egypt and Sudan have all known ethnic conflicts in one way or another. This has been a serious hurdle towards state-building in those countries.[3] As Africa enters into another era of Constitution making after changes in autocratic regimes after the Arab spring, this paper aims at examining how the Constitution can be a starting point to encourage participatory politics and offering adequate representation of minorities in countries demographically dominated by one or two groups, be it religious or ethnic.

The example of Mauritius and its unique political arrangement known as the 'Best Loser System' (BLS) is studied and evaluated to see to what extent such an arrangement can serve as inspiration to African countries currently engaged in constitution-making. On one hand, the BLS is believed to have been at the root of the success of Mauritius to maintain a peaceful and very tolerant society despite being multi-racial. However, after serving the Mauritian political system for 45 years, some people believe that the BLS

[1] Curtis M 'Certain persecution awaits Coptic Christians in post Morsi Egypt' available at http://balfourpost.com/certain-persecution-awaits-coptic-christians-in-post-morsi-egypt/ (accessed 28 July 2013).
[2] Hussein AR 'Egypt's new Coptic pope faces delicate balancing act' available at http://www.guardian.co.uk/world/2012/nov/04/egypt-coptic-pope-balancing-act (accessed 28 July 2013).
[3] UNESCO Paper *Ethnic conflict and state-building in the Arab world* (1998) p 235.

institutionalizes racial division. Is the BLS still effective and could serve as an example to other African Countries? The paper tries to shed some light on this question.

The first part of the paper provides an overview of the legal framework at the international level with regards to minorities' representation in the legislature and how some chosen countries have been implementing it. The BLS in Mauritius is then explained by looking at its historical raison d'être as well as providing technical explanation about its functioning. This is followed by an overview of the role and the stand of the judiciary in Mauritius in the interpretation of laws in relation to the BLS. Lastly, the drawbacks and the merits of the BLS is critically analysed to attempt at answering the question of the BLS can serve as an example for the rest of Africa.

2. THE INTERNATIONAL LEGAL FRAMEWORK ON POLITICAL REPRESENATATION OF MINORITIES

2.1 Participation of minorities in public life

To highlight the importance of the participation of minorities in public life, it matters to first shed some light on the definition of minorities. Article 1 of the United Nations Minorities Declaration makes reference to minorities as based on national or ethnic, cultural, religious and linguistic identity and imposes an obligation on states to protect their existence. It is to be noted there is no globally agreed definition of minorities or which group is to be regarded as one. This is explained by the fact that minorities live in different countries and under different conditions such that categorising them may not be easy or even appropriate. According to Francesco Capotorti,[4] a minority would be:

> 'A group numerically inferior to the rest of the population of a State, in a non-dominant position, whose members—being nationals of the State—possess ethnic, religious or linguistic characteristics differing from those of the rest of the population and show, if only implicitly, a sense of solidarity, directed towards preserving their culture, traditions, religion or language'.[5]

Being in a non-dominant position is one of the essential criteria for the qualification as a minority group. The notion of numerical minority is debatable as some a majority in a country may be in a non-dominant position as was the case of Blacks under the apartheid South Africa. It is now commonly accepted that it is not solely to the discretion of the states to decide on who constitutes a minority group but it also depends on subjective criteria such as whether the particular group want to preserve its distinctness and the will of an individual to be part of that group.

[4] Former Special Rapporteur of the United Nations Sub-Commission on Prevention of Discrimination and Protection of Minorities.

[5] See 'Minorities Rights Under International Law' *United Nations Human Rights* available at http://www.ohchr.org/EN/Issues/Minorities/Pages/internationallaw.aspx (accessed 26 August 2013).

Being a distinct section of the population, minorities have particular concerns and needs, be it economic, social or political. For those particular demands and concerns to be taken into account, political participation is a must to provide them with the opportunity to influence the course of general development in a society.[6] A number of mechanisms have been adopted across the world to realise political representation of minorities such as proportional electoral systems, territorial autonomy or guaranteed minority seats in parliaments and federalism.[7] The goal of ensuring political participation of minorities is to make sure that, similar to the majority; minorities can also look up to the government as their own. They need to be consulted when legislations are being drafted, their interests must be taken into consideration when decisions are being made by the government and most importantly they need to be given the proper political platform for an effective political representation. International law has developed a framework for such representation which is summarised below.

2.2 The legal framework

The International Covenant on Civil and Political Rights (ICCPR) provides the right of everyone to take part and be involved in the public affairs of a state, directly or through freely chosen representatives in its Article 25. This provision is in fact inspired by the article 21 of the Universal Declaration on Human Rights which provides that 'Everyone has the right to take part in the government of his country, directly or through freely chosen representatives'. The Human Rights Committee has interpreted the conduct of public life as the exercise of power in the legislative, executive and administrative branches.[8] It adds that once a mode of participation in public affairs is established, no distinction can be made between citizens based on grounds such as colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status, and no unreasonable restrictions should be imposed.

The United Nations Declaration on the Rights of Persons Belonging to National or Ethnic, Linguistic or Religious Minorities (UNDM) states that 'persons belonging to minorities have the right to participate effectively in cultural, religious, social, economic and public life'.[9] The same Declaration provides for the right to 'participate effectively in decisions on the national, and where appropriate, regional level concerning the minority to which they belong or the regions in which they live'.[10] We note the use of the word 'effective' to qualify the participation. It means that it does not suffice for states to have political

[6] Crowley J 'The Political Participation of Ethnic Minorities' (2001) 22 *International Political Science Review* 99 121.
[7] Baubock R 'Multinational Federalism: Territorial or Cultural Autonomy' Willy Brandt Series of Working Papers in International Migration and Ethnic Relations 2001.
[8] General Comment No 25 'the right to participate in public affairs, voting rights and the right of equal access to public service' *Human Rights Committee* UN Doc CCPR/C/21/Rec.1/Add.7,para. 5.
[9] Article 2(2).
[10] Article 2(3).

structures that suit the needs and demands of minorities. What is most important is whether such structures can effectively be used by minorities and whether they have a significant, and not simply symbolic, in the public affairs of a state. In addition, Article 5 of the International Covenant on the Elimination of Racial Discrimination (ICERD) prohibits racial discrimination and guarantees equality in the enjoyments of political rights. Women from minorities groups are equally guaranteed the right to political participation without discrimination by Article 7 of the Convention on the Elimination of all forms of Discrimination against Women which imposes an obligation on states to take all appropriate measures to eliminate discrimination against women in the political and public life of the state.

The guarantee of minorities to participate in public affairs as afforded by the various abovementioned legal instruments have been further emphasized in the case of *Antonina Ignatane v Latvia*[11] in which the complainant was prohibited from standing as a candidate in a local election in Latvia on the ground that she was not competent in the Latvian language even though she has passed a certified test on the highest level of proficiency in Latvian language. The Human Rights Committee upheld Article 25 stating that minorities (in the case on the basis on language) cannot be excluded from the public affairs of a state by preventing them from standing as candidates for elections.

2.3 Participation of minorities in public life under the African human rights system

The African Charter on Human and Peoples' Rights (the Charter) provides for the right to every citizen to participate freely in the government of his country directly or through freely chosen representatives in article 13. This is reinforced by article 20 on the right to self-determination which provides for the right of peoples' (minorities included) to freely determine their political status. Article 13 has interpreted in the case of *Legal Resources Foundation v Zambia* in which the African Commission on Human and Peoples' Rights held that the phrase 'in accordance with the law' should not allow states to create legislations that would prevent an individual from freely exercising his right as guaranteed under article 13 as provisions of the Charter should be interpreted in a holistic manner with all clauses reinforcing each other.[12] In addition, the Commission has highlighted that legal limitations to article 13(1) can only be allowed if it conforms to internationally acceptable norms and standards in the case of Purohit v The Gambia.[13]

[11] *Antonina Ignatane v Latvia* (2005) Human Rights Committee Communication No. 884/1999, CCPR/C/72/D/884/1999.
[12] *Legal Resources Foundation v Zambia* reference (2001) AHRLR 84 (ACHPR 2001).
[13] Purohit v The Gambia reference (2003) AHRLR 96 (ACHPR 2003).

2.4 Some examples of inclusive political systems used around the world

Minority groups are present in almost all countries of the world albeit to varying degrees. Minority representation can present real challenges as it is not simple to identify clearly who should count as a minority in a given country. Certain countries such as Belgium and France refuse to make distinction among citizens and they do not even collect data on ethnicity for instance but only on nationality.[14] The problem is accentuated by the fact that there is no internationally agreed definition of minorities. However, some countries have tried to engineer their political system in such a way that minorities are politically represented. Explicit recognition of communal groups has been given by way of communal rolls, reserved seats for minorities, ethnically mixed or mandated candidate lists and best loser seats.

Communal rolls provide an entire system of parliamentary representation based on communal considerations. In other words, each defined minority has its own electoral roll and elect members of its own minorities only to represent them in the parliament. Fiji and New Zealand are examples where communal rolls are applied in their electoral system. Fiji, for instance, allows its minorities groups (indigenous, Indian, European and Chinese) to elect members to parliament based on this system.[15] New Zealand has made use of this system in a more interesting way as Maori electors can choose to be on either national electoral rolls or a specific Maori roll.[16]

Reserved seats are considered as the most effective system when it comes to political representation of minorities. This system has been adopted by countries such as India (scheduled tribes and castes), Pakistan (non-Muslim minorities), Colombia (Black communities), Slovenia (Hungarians and Italians) and Taiwan (aboriginal community). Reserved seats are allocated to members who are elected by electors from minorities group.[17] United Kingdom has made modified this system by using representation of regions rather than formal reserved seats as more members of the Parliament are from Scotland and Wales than UK itself to cater for the minorities in those regions.[18] Other countries such as Lebanon make use of ethnically mixed list to ensure balanced ethnic representation.[19] Finally, best loser system is another one used for political representation of minorities and it is going to be the subject of the following part. It matters though to highlight at this point that some countries such as Singapore and Ecuador do use the best loser system but it is not based on ethnic or racial criteria.

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[14] Feskens R 'Collecting Data among Ethnic Minorities in an International Perspective' available at http://fmx.sagepub.com (accessed 28 August 2013).
[15] Newton W 'Fijians, Indians and Independence' (1970) 42 *The Australian Quarterly* 33.
[16] Stern P & Druckman D 'International Conflict Resolution after the Cold War' 1 ed (2000) ch 14.
[17] Reilly B & Reynolds A 'Electoral Systems and Conflict in Divided Societies' (1999) 41.
[18] Saggar S & Geddes A 'Negative and Positive Racialization' (2000) 26 *Journal of Ethnic and Migration Studies* 28.
[19] Ekmekji A 'Confessionalism and Electoral Reform in Lebanon' (2012) 16.

3. THE BEST LOSER SYSTEM

3.1 An overview of the Mauritian electoral system

The electoral system of Mauritius is very distinct with unique features as explained in the First Schedule to the Constitution. Firstly, the country is divided into 20 constituencies (with Rodrigues Island being the 21st Constituency) in which each voter votes for three candidates that get elected based on the highest number of votes. An adapted form of the 'first-past-the-post' system, it is referred to as the 'three-first-past-the-post' system (TFPTP). It is argued that the TFPTP system produces relatively stable government. Voters have the opportunity to hold each elected member from a specific constituency accountable based on the way he/she implement his/her manifesto[20]. It therefore keeps a connection or link between the people and the parliament through the elected member as the latter represents a particular geographical area.

However, the drawbacks of the TFPTP system are significant and non-negligible. Indeed, there is the possibility of representatives getting elected on tiny amounts of public support since the margin of votes obtained does not matter. What is important is to get more votes than other candidates[21]. In addition, votes registered for losing candidates counts for nothing even if the difference between the losing one and the winning one is a narrow one. While the FPTP system can be observed in other democracies in the world, the BLS can be said to be very distinct to the Mauritian electoral system. It is therefore relevant to examine the context in which the BLS was proposed and introduced as an essential electoral device.

3.2 A historical background to the BLS

The rationale behind the BLS was primarily to provide concrete re-assurance to religious minorities in Mauritius that they would be fairly represented in the Parliament allowing them to active participation in politics. The Mauritian population consisted of Hindus, Muslims, Christians and Buddhists, the latter two being the minorities group. Before becoming an independent country, elections were held during the British rule and based on the FPTP system, some Mauritians did get the opportunity to participate in local politics of the country albeit for advisory purposes. At that particular point in time, the under-representation or over-representation of one religious group was not a real issue as the locals contented themselves with the fact that at least Mauritians were represented through which their voices could be heard by the colonial master.

[20] Woolf A *Systems of Government – Democracy* (2009) 25.

[21] Electoral Reform Society 'First Past the Post' available at http://www.electoral-reform.org.uk/?PageID=481 (accessed 30 July 2013).

However, the need to have all the religious communities politically represented was highlighted by Hilary Blood, Governor of Mauritius from 1949 to 1953.[22] While he was of the view that a temporary measure was required for equal and fair representation, he warned of the danger of having such measure installed for long as it would show that the country was still divided along racial lines and could not find a national unifying factor. It was in 1956 at the London Conference, forum in which the independence and electoral system of Mauritius was discussed, that it was decided that an electoral system based on grounds of political principle and party rather than on race and religion should be designed.[23] But because of the diversity of the population on religious grounds, it was also decided that the system should give an opportunity to all factions of the population to elect their representatives in a proportional way.

The London Agreement of 1957 set up the first commission that was responsible for the design of an electoral system in line with the above mentioned criteria. Under the chair of Sir Malcolm Trustman-Eve, a report was submitted in which Mauritius was divided into forty constituencies and each would return one elected candidate by FPTP system. The second part of the report contained the BLS which suggested that 'nominees' be appointed by the governor based on racial lines in order to secure proper representation of all religious groups. It was the first time communal representation was institutionalised in the electoral map of Mauritius.[24] For it to function, the Mauritian population was divided into Indo-Mauritians Hindus, General Population and Indo-Mauritian Muslims. At that time, Sino-Mauritians had not yet naturalised and were not considered as constituting part of the Mauritian population.[25] The election of forty elected members and a maximum of twelve nominated members based on Trustman-Eve Report were provided for by section 17 of the Mauritius (Constitution) Order in Council of 1958. In 1964, the number of nominees was increased to fifteen.[26]

A second conference followed in 1965, known as the Lancaster House Conference during which the Banwell Commission of 1966 was appointed to review the electoral system of Mauritius.[27] The task of electoral commissioner Banwell was to advice the British Government on the most appropriate way of allocating seats in Mauritius with regards to the main sections of the population being given a fair representation of their interests.[28] The first change brought to the electoral system of Mauritius was about the constituencies. Banwell proposed that there be 20 constituencies and each constituency would elect three members based on the TFPTP system, a proposition that would in end be maintained till

[22] Blood H *Ethnic and Cultural Pluralism in Mauritius* (1982) 356-362.
[23] Collendavelloo I *Report of the Select Committee on the Introduction of a Measure of Proportional Representation in Our Electoral System* (2004) 7.
[24] Mathur H *Parliament in Mauritius* (1991) 55.
[25] n 7 above.
[26] Mauritius (Constitutional) Order in Council 1964, s 25.
[27] Cawthra G *Security and Democracy in Southern Africa* (2001) 98.
[28] Central Office of Information Great Britain *Mauritius* (1968) 9.

now. What was proposed by Banwell in the form of having five constant correctives or 'best losers' to provide for fair representation was strongly opposed by the majority party, the Mauritius Labour Party, headed by Sir Seewoosagur Ramgoolam. According to them, such a measure would be against the concept of proportional representation. Due to major differences between political parties as far as the BLS is concerned, Mr John Stonehouse was nominated to act as negotiator.

The Stonehouse report maintained the 20 three-member constituencies for Mauritius and one two-member constituency for Rodrigues amounting to 62 members being directly elected based on the FPTP system. Concerning the BLS, eight best loser seats were designated with more precision on how they would be allocated. The first four seats would be allocated to under-represented communities without regards to party affiliations. The second set of four would be designated on the basis of party and community. The second set takes party in account so that in can still maintain the winning political party as winners in case there is a change after the allocation of the first set of best loser seats.

3.3 Legal overview of the BLS

Entrenched in the First Schedule of the Constitution, the BLS was designed to political representation of minorities. Upon the insistence of Sir Abdool Razack Mohamed, leader of the political party called Muslim Action Committee, the BLS became an integral part of the Constitution. In a nutshell, the BLS comprises of the division of the population into religious groups and the allocation of 8 additional seats as best losers. The division of the population along religious lines requires a closer scrutiny as it has been the reason behind the criticisms levied against the BLS. In addition, the population census on which this division is based dates back to 1972 and has not been updated yet. The third and fifth paragraph of the First Schedule reads as follows:

' Every candidate for election at any general election of members of the Assembly shall declare in such manner as may be prescribed which community he belongs to and that community shall be stated in a published notice of his nomination.'

'For the purposes of this Schedule, the population of Mauritius shall be regarded as including a Hindu community, a Muslim community and a Sino-Mauritian community; and every person who does not appear, from his way of life, to belong to one or other of those 3 communities shall be regarded as belonging to the General Population, which shall itself be regarded as a fourth community.'

It is mandatory as a candidate to the elections to state from which community (religious group) he/she belongs while filling the nomination paper as this particular information would be essential for the calculation of best losers' seats after the counting process. If the community is not stated, the returning officer can hold the nomination paper as

invalid.[29] The interpretation of the word 'community' and the way some candidates have used the provision has required the intervention of the Supreme Court of Mauritius. In the case of *Carrimkhan v Tin How Lew Chin & Ors*[30], the applicant was claiming that his right to stand as a candidate has been violated by the wrongful declaration on community by the respondents as it would upset the proper allocation of best loser seats. In fact, the respondents did not belong to the communities they stated in their nomination papers. Being ardent opponents of the BLS that they viewed as instigating racism, five of the respondents who were candidates of the Tamil Council declared in court that they are atheists and therefore do not belong to the Hindu, Muslim or Sino-Mauritian communities but to the General Population. However, historically Tamils have been considered as being part of the Hindu Community. The remaining respondents, again to show their opposition to the BLS, decided upon their communities based on drawing of lots. In summary, the respondents were of the view that a qualified candidate could not have his/her nomination paper rendered invalid based on communities.

The learned judge was of the view that the nomination paper could not be rendered invalid per se as their communities have been declared. However, the issue was did they really belong to the communities they pretend they belonged too. He opined that it would be incorrect to interpret 'community' in the First Schedule as community according to one's religion as a Sino-Mauritian could be a Buddhist or a Christian. According to the judge, it was perfectly constitutional for some of the respondents to declare themselves as belonging to the General Population. After all those debates, he finally left the BLS to the Parliament to be addressed under the electoral and constitutional reform!

In the case of *Narrain & Ors v Electoral Supervisory Commissioner & Ors*[31], the matter before the court again was related to declaration of community in nomination paper. In this case, the applicants did not fill in the required community and left it blank. Again, the nomination was declared invalid and they challenged it in court. The main contention was about whether a provision enacted by Parliament[32] rendering a nomination invalid in case of failure to declare community was contrary to the spirit of the Constitution. The Supreme Court decided in favour of the applicant stating that forcing a candidate to declare his/her community curtailed his/her constitutional right to stand as a candidate at general elections. His decision was reversed by the full bench of the Supreme Court which declared that declaration of community in nomination paper was compulsory based on the First Schedule to the Constitution.[33]

[29] Para 11 of the National Assembly Elections Regulations 1968.
[30] *Parvez Carrimkhan v Tin How Lew Chin & Ors* SCJ 264 (2000).
[31] *Narrain & Ors v Electoral Supervisory Commissioner & Ors* SCJ 159 (2005).
[32] n 13.
[33] *The Electoral Supervisory Commission v The Honourable Attorney General* SCJ 252 (2005).

Besides community, the 1972 census on which the division of the population along community lines is based has also been a contention and subjected to criticism. In *Ex Parte Electoral Supervisory Commissioner and Electoral Commission & Ors*[34], the issue was whether the allocation of best loser seats should still be done based on a census that dates back to 1972. The court held that the exercise could only be done based on the latest census as can be read from paragraph 5(8) of the First Schedule.[35] However, the wordings 'latest census' was amended by Parliament to 'the results of the published 1972 official census' as from 1982 people were no more required to indicate which community they belong to which meant that only the 1972 census would be available with information regarding community. The court held that it was questionable whether representation would be fair and adequate if allocation of best loser seat were based on figures that reflect the reality of 20 years ago and not the present reality.[36] But again the court invited the Parliament to look into the matter in an effort to respect the doctrine of separation of powers. The 'archaic' nature of the 1972 census was also highlighted in *Joomun v The Government of Mauritius & Anor*.[37]

Based on the various decisions of the Supreme Court of Mauritius, it can be safely concluded that a number of cases were decided on the technicalities of the BLS such as interpretation of 'way of life', definition of community and the use of the 1972 Census. The general perception is that, as individuals, judges of the Supreme Court may not be in favour of such a system. However, perhaps faced by the mammoth task of coming out against the BLS or in an effort to follow the constitutional concept of separation of powers, the judiciary has not been able to take a proper stand. Some political parties are completely against the system whereas the population in general may not necessarily understand the importance of the system for the purpose of political representation of minorities. The only fact about which there is a sense of dissatisfaction and discontent among Mauritian is allegedly the wrong usage of the BLS by political parties to meet their needs. The following part of the paper demonstrates how the BLS has been vital to Mauritius as far as nation building and proper political representation is concerned and advocates that, with necessary structural amendments, it should be kept.

3.4 The Human Rights Committee decision on BLS

At this point, it is important to consider the decision that the United Nations Human Rights Committee rendered against Mauritius in August 2012.[38] The complaint in that case was that that regulation 12, paragraph 5, of the National Assembly Elections

[34] *Ex Parte Electoral Supervisory Commissioner and Electoral Commission & Ors* MR 166 (1991).
[35] 'the results of the latest published official census'.
[36] Leclezio H 'People and Politics' in Macmillan A *Mauritius Illustrated* ed (1914) 139 – 141.
[37] *Joomun v The Government of Mauritius & Anor* SCJ 234 (2000).
[38] *Devianand Narain et al v Mauritius* (2012) Human Rights Committee Coomunication No. 1744/2007 CCPR/C/105/D/1744/2007.

Regulations 1968, to the extent that it invalidates the nomination of a candidate to a general election who does not declare to which of the Hindu, Muslim, Sino-Mauritian or General Population communities he allegedly belongs, violates article 25 of the Covenant. The complainant added that paragraph 3 (1) of the First Schedule to the Constitution, in imposing an obligation on a candidate to a general election to declare the "community" he is supposed to belong to as interpreted by the Supreme Court, also violates article 25. They submitted that regulation 12, paragraph 5, of the National Assembly Elections Regulations 1968 and paragraph 3 (1) of the First Schedule to the Constitution, individually or cumulatively, violate article 25, inasmuch as they create objectively unreasonable and unjustifiable restrictions on their right to stand as candidates and be elected at general elections to the National Assembly.[39] They added that the criterion of a person's way of life, which is the basis of the four-fold classification of the State party's population, is not only vague and undetermined but is also totally unacceptable in a democratic political system. It cannot form the basis of a sanction, which leads to curtailing the authors' rights under article 25.

The Committee based itself on its jurisprudence to state that any condition that applies to the exercise protected by article 25 should have reasonable and objective basis.[40] It also made reference to its General Comments on article 25 whereby it has been stated that persons who are otherwise eligible to stand for election should not be excluded by unreasonable or discriminatory requirements such as education, residence or descent, or by reason of political affiliation.[41] The Committee found Mauritius to be in violation of article 25 and the State was ordered to report to the Committee on any measure taken to remedy the situation within 180 days.

The views of the Committee on this matter have received a considerable amount of criticism. For instance, it has been argued that the Committee has not failed to understand concepts such as 'way of life' as explained by the Supreme Court of Mauritius and therefore their decision is not well informed. It accepts the argument of the complainant that they were 'unable to categorise themselves in the prescribed compartments, that is as belonging either to the Hindu, Muslim, Sino-Mauritian or General Population community' when it is clear that the General Population residual category was created just for that purpose and where the 'way of life' test does not apply.[42]

[39] *Devianand Narain et al v Mauritius* (2012) para 3.1.
[40] *Debreczeny* v. *Netherlands* (1995) Human Rights Committee Communication No. No. 500/1992.
[41] General comment No. 25, para. 15.
[42] BLS – 'Mauritius will not be bullied by an unfair and biased UN Human Rights Commission' *Le Matinal* 7 September 2012 available at http://www.lematinal.com/blogs/18398-Blog-BLS---Mauritius-will-not-be-bullied-by-an-unfair-and-biased-UN-Human-Rights-Commission.html (accessed 27 August 2013).

4. CRITICAL ANALYSIS OF THE BLS

The drawbacks and the merits of the BLS will be analysed in this part with the aim of having a balanced opinion on whether the BLS has helped Mauritius to maintain a peaceful and tolerant society with the help of equal and fair political representation or does it institutionalize racism division. While it is famously alleged in Mauritius that politicians have made use of the system to suit their needs, for example having more minorities in their party so increase their chances of having them allocated seats based on the BLS and hence strengthening their hold on power in parliament, this allegation would not be the basis of the discussion. The aim is to look at the system itself and its inherent defects or advantages and how it has helped Mauritius in its process of nation-building.

The most famous criticism that is levied against the BLS is that it is 'undemocratic' and against the principle of 'Mauritianism'. For instance, Raj Mathur, a famous political scientist in Mauritius held the view that 'the BLS is the most undemocratic and is incompatible with the spirit and the letter of the Constitution, which stipulates that Mauritius shall be a sovereign and democratic state.[43] Rama Sithanen, former Minister of Finance and Vice Prime Minister of Mauritius, is of the view that BLS ethicizes the electoral system, classifies candidates and electors, legitimises communalism and inhibits nation building in total contradiction to the new dawn hailed by many.[44]

The two key words from critics of the BLS is undemocratic and against 'Mauritianism'. One of the most important components of democracy is inclusion and the possibility of all eligible citizens to participate in government.[45] It becomes highly questionable to say that BLS is undemocratic as it promotes inclusion unless reference is being made here to majoritarian democracy which by no means is a universally accepted concept as it bears the inherent danger of 'tyranny of the majority'.[46] In addition, the political system of Mauritius and specially the way minorities have been taken into account has got a fair comment from the outside world. According to the World Development Report, Mauritian governments have generally chosen broad based growth and distributive policies over ethnic preferences. All governments have had to form multi-ethnic coalitions in order to assume and maintain power.[47] The effort has been to weave political spoils system which has ensured that ethnic group has an established stake in the system, thus ensuring its legitimacy by all the ethno religious communities on the island.[48] Without attempting to justify how democratic the system in Mauritius is as this is not the

[43] Mathur R 'Parliament in Mauritius' 1 ed (1991).
[44] Sithanen R 'The Best Loser System – Can the new Prime Minister rise to the national unity challenge' *L'express* 6 October 2003.
[45] Young I 'Inclusion and Democracy' 1 ed (2002) 21.
[46] Arter D 'Democracy in Scandinavian: consensual, majoritarian or mixed?' (2006) 15.
[47] World Bank Report (1997) 113.
[48] Mukonoweshro E 'Containing Political Instability in a Poly-Ethnic Society: The case of Mauritius' (1991) 14 *Ethnic and Racial Studies* 199 – 224.

purview the study, what the aforementioned reports indicate is that the BLS has not hamper the democratization process in Mauritius to say the least.

It is essential to argue on the point that BLS is against the principle of 'Mauritianism' which is a locally coined term which can be equated to 'feeling Mauritian first and then Hindu, Muslim or Christian'. What matter most in a multi-racial society are tolerance and the will to learn and respect differences which sociologists refer to as managed intimacy – the will to minimize open conflicts and undue stress.[49] Tolerance in the Mauritian society is very much present. In fact, Mauritius is often used as an example to illustrate how the most dominant religions of the world have co-existed peacefully. Differences in culture, tradition and religious practices are to be celebrated and not forcefully erased for the purpose of nation building. Positive peace has been present in Mauritius since independence together with BLS. To say that BLS is a system that inhibits 'Mauritianism' would be a mere exaggeration. Does the BLS institutionalize racism in Mauritius? Institutional racism describes any kind of system of inequality based on race.[50] It occurs when access to goods, services and opportunities in society are limited and regulated negatively based on race.[51] The BLS was inserted in the electoral system to allow political representation of minorities. It is not an institutionalized system that breeds racism.

On the contrary, the BLS has encouraged political parties to be multi-ethnic in nature and has prevented polarisation of political parties based on religious or racial lines. It has provided the possibility of minorities to be represented in the Parliament through which they have been able to influence parliamentary debates on aspects that touch their lives and way of living directly. Minorities and their representatives in Parliament have been able to guide law makers on how to meet their demands and needs through legislation. For instance, there is a Marathi Speaking Union Act 2008 that regulates and promotes the Marathi language, culture and tradition.[52] The drafting of such a piece of legislation could have been highly ineffective and insensitive to the Marathi minority if they were not represented adequately in Parliament. One could argue that political parties can well have a significant number of Marathi candidates for election and if they are elected through the FPTP system, then Marathi would still be represented. What if they do not make it to Parliament through the FPTP system? The BLS is the system that remedies such eventualities to guarantee political representation of minorities in any circumstances.

[49] Bunwaree S 'Economics, Conflicts and Interculturality in a Small Island State: The Case of Mauritius' (2002) 9 *Polis/R.C.S.P*
[50] McCormack D 'Stokely Carmichael and Pan-Africanism: Back to Black Power' (1973) 35 *The Journal of Politics* 386 – 409.
[51] Coretta P 'Institutional Racism and Ethnic Inequalities' (2011) 40 *Journal of Social Policy* 173-192.
[52] We equally have the Tamil Speaking Union Act, the Telegu Speaking Union Act, the Urdu Speaking Union Act and the Chinese Speaking Union Act.

5. CONCLUSION

The BLS was introduced in the Mauritian electoral system on a temporary basis up to the point where, with the good will of political parties, a new system which is not based on religion could be devised to ensure political representation and participation of minorities. Four and a half decade after independence, the BLS is still very much present in Mauritius and it is foreseen to remain in the electoral picture for a long time. Undeniably, the system may have its inherent defects or may be prone to the wrong use by politicians. But at the end of the day, it serves one purpose – representation of minorities in Parliament. They have an opportunity through the BLS to exercise their right to political representation and participation.

Mike Moore, former Prime Minister of New Zealand assessed the BLS in such terms – How to handle minorities is a difficult path to navigate in many societies which have deep differences in religion, race, language and customs. Some seek solutions to ensure a majority does not overwhelm minorities by embracing federal systems. Others seek proportional representation to ensure all opinions sit in Parliaments but proportional representation sometimes means candidates only mobilise their own communities, creating polarisation. It's not easy. Clever little Mauritius has a unique way of ensuring that their large Muslim, Hindu and smaller Christian communities are represented in their parliament. It's called the 'best loser' system, not the most snappy or dignified title but it means that individuals from different communities must seek support from across all groups. A constitutional quota demands a certain number of members of Parliament from each community.[53]

Many African countries that are looking to remodel their constitutions or those who are entering a new era after long periods of dictatorship can draw inspiration from the BLS system. Whether after 45 years, their citizens would feel that it institutionalize racism is an altogether different story. Actually, that would be good news as it would mean that people then feel more patriotic and want to belong to a country rather than a religion or race, as it currently the feeling in Mauritius. What is probably overlooked is that such as feeling has been possible by this very BLS as it has allowed minorities to feel part of the country and public life. The BLS would be a starting point for multi-ethnic or multi-religious countries in Africa. It will help stabilize the political system and provide a platform for further development.

[53] Moore M 'The tide is turning in the Middle East' *New Zealand Herald* 29 June 2005.

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