

## Mauritius Country Report

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### I. Origins and Historical Development of the Constitution

Uninhabited at the time of its discovery, Mauritius was successively a French colony up to 1814 and, until its accession to independence in 1968, a British colony. This dual colonisation has left a lasting imprint on the legal system of the country because the capitulation of the French was marked by a pledge from Britain in the Treaty of Paris that settlers would retain their language, their customs, and their civil rights. As such, the Mauritian legal system is a unique hybrid blend of French civil law and English common law, overseen by a British-inspired court system.<sup>1</sup>

Like some other parts of the British Empire, Mauritius achieved independence more through concession from the parent country than nationalist sentiment. While anti-colonial feelings were expressed by the Hindu majority, large sections of the other minority ethno-religious groups (Muslims, Creoles,<sup>2</sup> Franco-Mauritians, and Chinese) preferred to maintain ties with Britain. In fact, forty-four per cent of the population voted against independence, being more interested in a form of integration with Britain.<sup>3</sup> It is doubtful, however, that Britain would have acceded to such a demand independently of the result of the vote.<sup>4</sup>

In spite of the tensions and fears surrounding a 'Hindu hegemony' following accession to independence, Mauritius developed a strong constitutional democracy, holding regular free and fair elections without major contestations.<sup>5</sup> The choice taken by the Mauritian polity to embrace substantive democracy may be explained by the long democratic history of the island, particularly relative to other African nations. The first – though very limited – elections, in which only the propertied French and Creole classes voted, were held in 1885, gradually expanding their reach

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<sup>1</sup> T. Eriksen, 'Multiculturalism, individualism and human rights: romanticism, the enlightenment and lessons from Mauritius', in R. Wilson (ed.), *Human rights, culture and context: anthropological perspectives* (1997) 176.

<sup>2</sup> Creoles are Mauritians of African and/or mixed origin.

<sup>3</sup> S. Bunwaree and R. Kasenally, *Political parties and democracy in Mauritius* (2005) 1.

<sup>4</sup> J. Houbert, 'Mauritius: independence and dependence' (1981) 19 *The Journal of Modern African Studies* 81, 83.

<sup>5</sup> Bunwaree and Kasenally (n3) 1.

until universal suffrage was instituted in 1959.<sup>6</sup> This idea of preparedness is reinforced by the realisation that independence was the result of a long drawn out process, with electoral reforms having started on the island as early as 1948.<sup>7</sup> Since attaining independence, nine general elections have been held (in 1982, 1983, 1987, 1991, 1995, 2000, 2005, 2010, and 2014).<sup>8</sup>

The current Constitution is a legacy of the former British colonisers and was adopted on 4 March 1968. It is not the first constitution for the island: the first was adopted as early as 1885 under the governorship of Sir John Pope-Hennessy. The 1885 Constitution provided for a Council of Government, members of which were either nominated or elected on a narrow franchise. Even then, wide executive powers remained at the discretion of the Governor General.<sup>9</sup> This Constitution governed Mauritian politics for more than sixty years, with the only significant amendment occurring in 1933, whereby the proportion of non-elected nominees in the Council was increased. Major reforms were implemented in the period immediately following the end of the Second World War. In the 1947 Constitution, elected members of the Council made up the majority of the legislature<sup>10</sup> and the franchise was so widened that the percentage of voters increased from two per cent to forty per cent.<sup>11</sup> While government was now more representative, executive powers were still evasive, leading to a resolution by a small majority of the Legislative Council, in December 1953, for increased self-government.<sup>12</sup> This led to a series of meetings in London, culminating in the London Agreement of 1957. Under the London Agreement, a ministerial system of government was introduced and an Independent Boundary Commission was appointed to assess the feasibility of the division of Mauritius into forty single-member constituencies in order to ensure proportionate ethnic representation.<sup>13</sup> A new constitution was promulgated in 1958 to enshrine these reforms. The 1958 Constitution also provided for universal suffrage as well as for a corrective method of electoral nomination by the Governor to allow for the representation of minorities. The latter was known as the ‘good loser system’, later renamed the ‘best loser system’ in 1966.<sup>14</sup> In 1961, wishing to increase the island’s self-governance and as such unconcerned by the opposition of some

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<sup>6</sup> A. Aft and D. Sacks ‘Mauritius: An example of the role of constitutions in development’ (2014) 18 *University of Miami International and Comparative Law Review* 111.

<sup>7</sup> Houbert (n4) 79.

<sup>8</sup> Bunwaree and Kasenally (n3) 1.

<sup>9</sup> S. de Smith, ‘Mauritius: constitutionalism in a plural society’ 31 (1968) *The Modern Law Review* 604.

<sup>10</sup> *Ibid.*

<sup>11</sup> Voting rights were extended under the 1947 Constitution to all those able to prove their ability to write one of the languages of the colony (English, French, Creole, and Indian languages) through a test. C. Boudet, ‘Le rôle du “péril hindou” dans la mise en place de la démocratie consociative à l’île Maurice (1947–73)’ (2012) 46 *Canadian Journal of African Studies / Revue canadienne des études africaines* 191.

<sup>12</sup> De Smith (n9) 604-605.

<sup>13</sup> De Smith (n9) 605.

Mauritian political parties, the United Kingdom instituted the Constitutional Review Conference.<sup>15</sup> In all, between 1955 and 1965, the colonial government organised four major constitutional conferences.<sup>16</sup>

While increased self-governance was undoubtedly and steadily becoming the order of the day, the multi-ethnic composition of the island proved an additional hurdle. Desirous of not exacerbating communal tension, no issue proved as arduous for the United Kingdom government and Mauritian political parties as the creation of a safe and adequate representative electoral system. A decisive constitutional conference took place in London in September 1965, building upon the past Mauritian experiences of elections to design the country's electoral system.<sup>17</sup> Among the issues decided was the ultimate status of Mauritius, as well as the constitutional framework to be adopted for self-government and independence.<sup>18</sup> While the conference resolved to grant Mauritius independence if a newly elected government gained support for independence, it did not finalise the electoral system. Instead, the British Secretary of State appointed a commission made up of Harold G. Banwell and Sir Malcolm Trustram-Eve, guided by S.A. de Smith, to make further recommendations on an appropriate electoral system and constituency boundaries. In 1966, the Banwell Commission proposed a modified electoral system combining elements of first-past-the post (FPTP) and proportional representation to ensure minority representation in Parliament. Five seats were to be allocated to the best losers from under-represented communities, subject to the political party securing at least ten per cent of the votes at the national level and one seat through the FPTP system. This electoral system was rejected by the political parties as detrimental to the political inclusion of minorities.<sup>19</sup> A modified version of the Banwell electoral system was then proposed by John Stonehouse, the Parliamentary Under-Secretary for the Colonies. Through this new proposal, the majority of Parliament was to be elected through the FPTP system with eight additional seats reserved for the best losers of the appropriate under-represented community in order to correct any ethnic imbalance. The proposal took away the requirements of a minimum percentage vote and at least one directly elected member.<sup>20</sup> This design of constituencies and representation is still used today.<sup>21</sup>

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<sup>14</sup> Boudet (n11) 182-183.

<sup>15</sup> Boudet (n11) 182.

<sup>16</sup> Ibid.

<sup>17</sup> Aft and Sacks (n6) 112.

<sup>18</sup> De Smith (n9) 607,608.

<sup>19</sup> De Smith (n9) 609.

<sup>20</sup> De Smith (n9) 610.

<sup>21</sup> Aft and Sacks (n6) 113.

On 21 December 1966, the Mauritius Constitution Order transformed Mauritius into an independent state. Elections were held in 1967, and on 12 March 1968 Mauritius became formally independent. Sir Seewoosagar Ramgoolam became the first Prime Minister. The Head of State was the Governor General, nominated by and representing the Queen of England. The Constitution of Mauritius Amendment No. 3 of 1991 declared Mauritius to be a republic and a sovereign democratic state. The Act came into force on 12 March 1992. The Legislative Assembly became the National Assembly and the Governor General was replaced by the President.

## **II. Fundamental Principles of the Constitution**

Article 1 of the Constitution provides that Mauritius is a ‘sovereign democratic State’. Its Article 2 emphasises the supremacy of the Constitution over other laws. In the case of *Ahnee v Director of Public Prosecutions*,<sup>22</sup> the Supreme Court analysed the structure of the Constitution to highlight its fundamental principles, since the Constitution does not contain a specific article that expands upon those principles. The Court concluded as follows:

First, Mauritius is a democratic state constitutionally based on the rule of law. Secondly, subject to its specific provisions, the Constitution entrenches the principle of the separation of powers between the legislature, the executive, and the judiciary. Under the Constitution one branch of government may not trespass upon the province of any other. Thirdly, the Constitution gave to each arm of government such powers as were deemed to be necessary in order to discharge the functions of a legislature, an executive and a judiciary.

Therefore, although the Constitution does not clearly state that it is based upon specific principles, *Ahnee* has established that the fundamental principles of the Mauritian Constitution are democracy, the rule of law, and separation of powers between the three arms of government. *Khoyratty* further established that one arm of government ‘may not trespass on the province of any other in conflict with the principle of separation of power’.<sup>23</sup> Both *Ahnee* and *Khoyratty*<sup>24</sup> thus examined the features of democracy referred to in Article 1 of the Constitution to identify the rule of law and in turn, the separation of powers, as important features of democracy.

## **III. Fundamental Rights Protection**

Chapter II of the Constitution provides for the protection of the individual from violations of human of fundamental rights by the government and its agents. This does not, however, mean that the

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<sup>22</sup> 1999 Privy Council 2 (AC) 302-303.

<sup>23</sup> *The State v Khoyratty* 2006 Privy Council 13 11.

<sup>24</sup> *Ibid.*

fundamental rights and freedoms of individuals can be breached in the private sphere: in the context of the right to protection from discrimination, it was held in *Roman Catholic Diocese of Port Louis v Minister of Education* that the provisions of Article 16 cannot be interpreted to mean that a private entity is entitled to practise discrimination.<sup>25</sup> From this decision, it can be deduced that not only is the government a bearer of this duty, but private institutions also have the responsibility to ensure that they do not violate Chapter II of the Constitution.

The Constitution does not set out the category of persons entitled to protection of the rights provided for in Chapter II. However, Article 3 lists ‘place of origin’ as a ground for non-discrimination when applying the provisions of the Constitution. This can be interpreted as implying that even foreigners within the territory are entitled to the protection of their fundamental rights and freedoms. However, as will be discussed below, some of the fundamental rights and freedoms can be limited in the event that they concern a foreigner.

Further, only civil and political rights are protected by the Constitution. It does not provide for economic, social, cultural, and ecological rights, which are set out in Acts of Parliament and are not part of the supreme law of the land. The sub-sections which follow will give an insight into the rights protected by the Constitution and the remedies available in the event of alleged violation of the rights protected by Chapter II.

## **A Rights protected**

Article 3 of the Constitution provides for the fundamental rights and freedoms of the individual and includes ‘the right to life, liberty, security of the person and the protection of the law’,<sup>26</sup> the right to ‘freedom of conscience, of expression, of assembly and association and freedom to establish schools’,<sup>27</sup> and ‘the right ... to protection for the privacy of his home and other property and from deprivation of property without compensation’.<sup>28</sup> This Article was previously viewed as a preamble to the provisions that follow, and cases brought under this Article were not considered by the courts if there was no reference to the specific Article of the Constitution providing for the relevant right.<sup>29</sup> However, it was later held, in *Société United Docks & Others v Government & Others*, that Article

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<sup>25</sup> *Roman Catholic Diocese of Port Louis v Minister of Education* 1991 SCJ 350.

<sup>26</sup> Art. 3(a) of the Constitution.

<sup>27</sup> Art. 3(b).

<sup>28</sup> Art. 3(c).

<sup>29</sup> *DPP v Jaulim* 1976 MR 96.

3 creates fundamental rights on its own and there is no need to refer to another Article of the Constitution when alleging a violation of Article 3.<sup>30</sup>

The rights protected by the Constitution, with limitations provided for, are the right to life, the right to personal liberty, the right to be protected from slavery and forced labour, protection from inhuman treatment, protection from deprivation of property, protection of privacy of home and other property, the right to a fair trial, protection of freedom of conscience, protection of freedom of assembly and association, protection of the freedom to establish schools, protection of freedom of movement, and protection from discrimination.<sup>31</sup>

The Supreme Court has had the opportunity to consider cases in relation to most Articles of Chapter II. However, for the purposes of this review only the landmark cases will be discussed.

Within the ambit of Article 4 of the Constitution, the Supreme Court was presented with an appeal concerning the constitutional provision on the death penalty.<sup>32</sup> The appellant contended that the death penalty was unconstitutional since it violated the right to life<sup>33</sup> and amounted to inhuman and degrading treatment. While highlighting the principle of separation of powers, the Supreme Court held that the mandatory death penalty prescribed for the offence of drug trafficking did not contravene Article 7 of the Constitution and that it was for Parliament to debate the pros and cons of the death sentence.

This case is indicative of the reluctance of the Supreme Court of Mauritius to decide on the constitutionality of the limitations placed on fundamental rights and freedoms if they do not violate other constitutional provisions. Furthermore, the Supreme Court is very wary of the principle of separation of powers since it is Parliament that is entrusted with the functions of making law and deciding which limitation is applicable. Despite the fact that the Supreme Court is reluctant to intervene with the law-making function of Parliament, it will not hesitate to do so if Parliament abuses its law-making powers. Where there has been abuse by Parliament in enacting a law, the Supreme Court will intervene to declare that law unconstitutional. For instance, in the case of *Mahboob v Government of Mauritius*,<sup>34</sup> the Supreme Court declared an Act to be unconstitutional

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<sup>30</sup> *Société United Docks & Others v Government & Others* 1984 MR 174.

<sup>31</sup> Arts 14 to 16 of the Constitution.

<sup>32</sup> *Amasimbi v The State* 1992 SCJ 178.

<sup>33</sup> Art. 4(1) of the Constitution: 'No person shall be deprived of his life intentionally save in execution of the sentence of a court in respect of a criminal offence of which he has been convicted'.

<sup>34</sup> *Mahboob v Government of Mauritius* 1982 MR 35.

and struck it down because the provisions therein amounted to a breach of Article 3 of the Constitution.

Similarly, the right to personal liberty protected by Article 5 is not absolute, but when limiting it the authorities have to ensure that they are not abusing their powers. The criteria to be taken into account by a court when depriving someone of his or her liberty in the event of a bail application are as follows:<sup>35</sup>

(a) the seriousness of the offence and the punishment it carries; (b) the risk that the offender may repeat the same offence though it would not always be easy to predict his future criminality; (c) the risk that the suspect may tamper with witnesses or destroy material evidence on his release; (d) the likelihood of the suspect not appearing at his trial if released; [and] (e) the strength of the evidence against the suspect.

This list is non-exhaustive and the court can take into account other factors. The elaboration of such criteria for the deprivation of someone's liberty indicates that the courts are very cautious that they do not infringe upon the right to liberty of the person.

Foreigners are also afforded the rights protected by the Constitution. This was demonstrated in the case of *Jeau Export Ltd v Felino & another*.<sup>36</sup> The applicant sought to limit the right to personal liberty and freedom of a foreigner who was allegedly indebted to him. The court decided that such a step would not be in line with the provisions of the Constitution as there was no evidence that the foreigner should be deprived of his right to personal liberty and freedom. However, as mentioned above, foreigners can be excluded from the protection of the rights protected in the Constitution if they do not fulfil the required conditions. For example, in the case of *Weg v Patel*, a foreigner was excluded from enjoying the right to property in Mauritius. It was held that a foreigner does not have the right to use the name of a Mauritian as a *prête nom* to acquire property in the country.<sup>37</sup>

This shows that the Constitution does not provide for absolute rights, and that those rights can be limited. For instance, in the case of *Mingard v The Commissioner of Police*,<sup>38</sup> the applicant's freedom of movement was restricted since there was a chance that an order to remove the objection to departure might hinder the private prosecution because the applicant might never return to Mauritius. Another example is *Aumeer v L'Assemblée de Dieu-Mission Salut*,<sup>39</sup> where the court

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<sup>35</sup> *Sheriff v District Magistrate of Port Louis* 1989 MR 260.

<sup>36</sup> 1993 SCJ 44.

<sup>37</sup> *Weg v Patel* 1991 SCJ 217.

<sup>38</sup> 1988 SCJ 73.

<sup>39</sup> 1988 SCJ 236.

limited the freedom of conscience under Article 11<sup>40</sup> of the Constitution because the loud speakers used during the prayer sessions of the respondent were ‘causing inconvenience to others’. This case also highlighted that fundamental rights can be limited in a civilised society if the exercise of those rights is causing trouble for others in the society.

The Constitution does not contain a provision concerning the interplay between religious and contemporary law. It simply protects freedom of conscience, which includes freedom of religion.<sup>41</sup> The issue of whether it was necessary for the Constitution to provide for personal religious laws for someone to benefit from their freedom of religion was raised in *Bhewa & another v Government of Mauritius*.<sup>42</sup> In this case, it was held that the non-enactment of personal laws did not imply that the person could not enjoy his or her religious freedom. Under Article 11(5) of the Constitution, the right to religious freedom can be limited if it is ‘reasonably justifiable in a democratic society’. Therefore, the status of personal religious law is that one can exercise one’s religious freedom under Article 11 of the Constitution as long as it does not form part of the limitations provided for by Article 11(5).

Furthermore, the Constitution provides for derogations to the fundamental rights and freedoms under the emergency powers.<sup>43</sup> Derogations will not be considered to be in contravention of the fundamental rights and freedoms ‘to the extent that the law authorises the taking during any period of public emergency of measures that are reasonably justifiable’.<sup>44</sup> However, there are very strict procedures to be followed for derogations, and the derogations would be unconstitutional in the event that the proper procedure was not followed or they were not ‘in the interests of peace, order and good government’.<sup>45</sup>

It has been pointed out that the Constitution is not a mere Act of Parliament and that the provisions therein must benefit from a purposive interpretation which allows for a broader protection of human rights.<sup>46</sup> As such, despite the limitation provisions in Chapter II, the Supreme Court has the responsibility to interpret the Articles in such a manner that limitations on fundamental rights and freedoms are imposed with great restraint.

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<sup>40</sup> Art. 11 of the Constitution: Freedom of conscience includes freedom of religion.

<sup>41</sup> Ibid.

<sup>42</sup> 1990 SCJ 126.

<sup>43</sup> Art. 18 of the Constitution.

<sup>44</sup> Art. 18(1).

<sup>45</sup> Ibid.

<sup>46</sup> *Duval v Seetaram* 1991 MR 21.



## **B Remedies in case of alleged violation of the rights provided by Chapter II**

Article 17 of the Constitution provides for remedies in the event of an alleged violation of the fundamental rights and freedoms set out in Chapter II. It states that someone who alleges a breach or a potential breach of Articles 3 to 16 of the Constitution may apply to the Supreme Court for relief. The Supreme Court has original jurisdiction to hear such cases and it ‘may make such orders, issue such writs and give such directions as it may consider appropriate’.<sup>47</sup> However, the Supreme Court will not exercise these powers if there are other remedies available under any other law.<sup>48</sup> Such redress under any other law may also be in the form of judicial review.<sup>49</sup> It should be noted that if the constitutionality of the other law which provides for redress is under question, that other law will not be considered as providing for redress.<sup>50</sup> The motivation behind the use of redress under other laws is to prevent abuses of Article 17 and to avoid ‘unfair priority over cases’ which are concerned with a violation of substantive human rights.<sup>51</sup>

An application for an alleged violation of Articles 3 to 16 of the Constitution must be done by way of plaint with summons<sup>52</sup> and it has to be lodged within ‘3 months after the right of action arises’.<sup>53</sup> If the plaint is lodged after this time period, the Court can hear the matter only if the plaintiff shows good cause for the delay. If a plaint is lodged after 3 months from the date on which the cause of action arose and no good cause is shown, the plaint will be set aside.<sup>54</sup> Furthermore, the plaint has to be clear about the time when the action arose, or it will not comply with the Constitutional Relief Rules of 2000.<sup>55</sup> The plaint with summons must also indicate the Articles of the Constitution that were or might be violated. If it cannot be established that there was a breach or a likely breach of any of Articles 3 to 16, the plaint will be set aside.<sup>56</sup>

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<sup>47</sup> Art. 17(2) of the Constitution.

<sup>48</sup> As above; *Emilien v The State of Mauritius & Another* 2012 SCJ 221.

<sup>49</sup> *Contract Bus Owners Association & Others v The National Transport Authority & Anor* 2014 SCJ 292.

<sup>50</sup> *Madhewoo v The State of Mauritius and Another* 2015 SCJ 177.

<sup>51</sup> *Vert v District Magistrate of Plaines Wilhems* 1993 MR 28.

<sup>52</sup> A definition of a plaint with summons was provided in *Hurnam v Peeroo* 2012 SCJ 41: the essence of a plaint with summons ‘is to provide, after reciting the parties, just the skeletal averments with skeletal facts to support the cause of action and the remedy sought’.

<sup>53</sup> Supreme Court, Constitutional Relief Rules, 2000.

<sup>54</sup> *Taujoo v State of Mauritius & Another* 2013 SCJ 332; *Talbot Fishing Co Ltd v Ministry of Fisheries and Cooperatives* 2002 SCJ 131; *Luk Tung v Commissioner of Police and Others* 1996 SCJ 240.

<sup>55</sup> *Contract Bus Owners Association v The National Transport Authority* (n34).

<sup>56</sup> *Pravind Jugnauth v The Secretary to the Cabinet and Head of the Civil Service Affairs & Others* 2013 SCJ 132; *Thakooree v Public Service Commission* 2011 SCJ 388; *Hurnam v State of Mauritius & Another* 2011 SCJ 317.

## **IV. Separation of Powers**

### **A The Head of State**

Mauritius is a parliamentary democracy based on the Westminster model. The President of Mauritius is the Head of State and Commander-in-Chief.<sup>57</sup> He is assisted by the Vice President.<sup>58</sup> To be eligible for election as President, the individual must be a citizen of Mauritius of at least forty years of age and must have resided in Mauritius for at least five years immediately preceding the election.<sup>59</sup> The President is elected by the National Assembly on a motion by the Prime Minister and supported by the votes of a majority of all the members of the Assembly. The President holds office for a term of five years and is eligible for re-election.<sup>60</sup> While in office, the President is immune from both civil and criminal proceedings. The President is also not able to be compelled as a witness in any legal proceedings.<sup>61</sup>

Although the Constitution vests executive authority of Mauritius in the President,<sup>62</sup> in practice the President exercises limited executive powers and carries out mostly ceremonial functions. The powers of the President are limited even with regards to bills passed by the National Assembly. Where the President withholds his assent, within twenty-one days of submission of the bill he/she must return the bill to the National Assembly for reconsideration. However, if the bill is passed again by the National Assembly with or without amendment and submitted anew to him/her for assent, the President has no option but to signify his/her assent.<sup>63</sup>

The President may be removed from office for violating the Constitution, for any serious misconduct, or due to an inability to perform his/her functions, whether arising from infirmity of mind or body.<sup>64</sup> In such cases, as well as when he/she withholds his/her assent of a bill twice, the President can be removed upon a motion by the Prime Minister supported by the majority votes of the members of the Assembly.<sup>65</sup> Removing the President from office for any other cause requires

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<sup>57</sup> Art. 28 of the Constitution. Although the Constitution mentions a Commander-in-Chief, in practice Mauritius does not have a standing army.

<sup>58</sup> Art. 29(1).

<sup>59</sup> Art. 28(3).

<sup>60</sup> Art. 28(2)(a).

<sup>61</sup> Art. 30A.

<sup>62</sup> Art. 58(1).

<sup>63</sup> Art. 46(2).

<sup>64</sup> Art. 30(1).

<sup>65</sup> Art. 30.

the support of the votes of the majority of all members of the Assembly on a motion by the Prime Minister, following the written recommendation of a tribunal.<sup>66</sup>

In 2014, the main party of the governing coalition and the main opposition party put forward, as part of their programme for the 2014 general elections, a project for electoral reform that would increase the powers of the President, thereby leading Mauritius to a presidential system. Under the proposed reforms, the President and the Vice President would be elected by universal suffrage for a period of seven years.<sup>67</sup> The powers available to the President would include the dissolution of the National Assembly; presiding over the Cabinet when he/she so decided; representing Mauritius in international fora; responsibility for the foreign policy of the country; and additional powers of appointment.<sup>68</sup> The surprising victory of the opposition coalition in those elections has been attributed to a robust rejection by the population of the proposed constitutional reforms.

## **B The Parliament**

Mauritius has a unicameral Parliament, which consists of the President and the National Assembly.<sup>69</sup> The National Assembly usually comprises seventy members, with seventeen members together with the presiding person constituting a quorum.<sup>70</sup> To be elected as a member of the Assembly, one must be a Commonwealth citizen of not less than eighteen years of age and have resided in Mauritius for a period of or an aggregate period of two years before the date for nomination, and at least six months immediately before that date. The person must be able to speak and (unless incapacitated by blindness or other physical cause) read English to a sufficient degree to take an active part in the proceedings of the Assembly.<sup>71</sup> The only members of the National Assembly who need not be elected are the Attorney General and the Speaker.

Parliament is vested with the legislative power of Mauritius, exercisable through bills passed by the National Assembly and assented to by the President.<sup>72</sup> A bill is passed when voted in favour by the majority of the members present: this includes, when elected, the Speaker. When the votes are cast equally, the Speaker, whether elected or not, or the presiding person, shall exercise the casting

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<sup>66</sup> Art. 30(3).

<sup>67</sup> Electoral Alliance Agreement between the MLP and the MMM, section 8, available at [http://www.lexpress.mu/sites/lexpress/files/attachments/article/2014/2014-09/2014-09-20/telechargez\\_integralite\\_de\\_laccord\\_signe\\_entre\\_le\\_ptr\\_et\\_le\\_mmm.pdf](http://www.lexpress.mu/sites/lexpress/files/attachments/article/2014/2014-09/2014-09-20/telechargez_integralite_de_laccord_signe_entre_le_ptr_et_le_mmm.pdf) (accessed 22 February 2016) .

<sup>68</sup> Electoral Alliance Agreement between the MLP and the MMM, section 4.

<sup>69</sup> Art. 31 of the Constitution.

<sup>70</sup> Art. 52.

<sup>71</sup> Art. 33.

<sup>72</sup> Art. 46(1).

vote.<sup>73</sup> So long as Parliament legislates within the framework of the Constitution, Parliament is supreme.<sup>74</sup> The life of Parliament is for a maximum of five years. There are no limits to the number of times one may sit in Parliament.

### **C The Prime Minister**

While executive power is granted to the President in the Constitution, in practice the governing powers, which include executive powers, are held by the Prime Minister. The affairs of state and responsibility for the administration of any governmental department lie with the Prime Minister and the ministers, who together form the Cabinet for Mauritius.<sup>75</sup> The Cabinet is headed by the Prime Minister.

The President appoints the Prime Minister from one of the members of the Assembly who appears to him/her best able to command the support of the majority of the members of the Assembly.<sup>76</sup> In practice, the leader of the winning party or coalition is appointed. In accordance with the advice of the Prime Minister, the President then appoints the Deputy Prime Minister, the Attorney General, and other Ministers. More than one Deputy Prime Minister may be appointed, as long as the number of Ministers other than the Prime Minister does not exceed twenty-four.<sup>77</sup> Only the offices of the Prime Minister, the Deputy Prime Minister, and the Attorney General are prescribed in the Constitution.<sup>78</sup>

The Prime Minister holds office until he/she ceases to be a member of the Assembly, or otherwise than by reason of the dissolution of the Assembly, or unless he/she is not a member of the Assembly at the first sitting thereof after any general election.<sup>79</sup> When a vote of no confidence is passed by the Assembly, the Prime Minister has three days to resign. He/she shall thereafter be removed by the President, unless Parliament has been or is to be dissolved in consequence of such resolution.<sup>80</sup> The President may also remove the Prime Minister if, as a result of changes in the membership of the Assembly resulting in a general election, the Prime Minister will not be able to command the support of the majority of members of Parliament.<sup>81</sup> The offices of the Ministers are closely tied with the office of the Prime Minister. The office of a Minister becomes vacant when the

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<sup>73</sup> Art. 53.

<sup>74</sup> *Vallet v Ramgoolam* 1973 MR 29.

<sup>75</sup> Art. 61(1) of the Constitution.

<sup>76</sup> Art. 59(3).

<sup>77</sup> Art. 59.

<sup>78</sup> Art. 59(2).

<sup>79</sup> Art. 60(3).

<sup>80</sup> Art. 60(1).

Prime Minister resigns or is subsequently removed upon a vote of no-confidence, as well as upon the appointment of any person to the office of Prime Minister. The President may also revoke a Minister upon the advice of the Prime Minister.<sup>82</sup>

## **D Independent judiciary**

The Constitution of Mauritius clearly rests on two fundamental tenets: the rule of law and the separation of powers.<sup>83</sup> These ensure the independence of the judiciary. In fact, the doctrine of separation of powers is implicit in the very structure of the Constitution, with its division of the powers vested in the executive, the legislature, and the judiciary into distinct parts. As such, Parliament has no more right to pronounce judgments than the courts have to pass laws. Where, however, it is averred that the legislature or the executive has exceeded their powers, the judiciary remains the ultimate arbiter.<sup>84</sup> In cases where these questions touch upon constitutional amendments, the court will refrain from pronouncing on the reasonableness and good faith of Parliament. The court will only consider whether the procedure has been followed in accordance with the Constitution and was not inconsistent with the Constitution.<sup>85</sup>

Mauritius has a single-structured judicial system consisting of two parts: the Supreme Court and the subordinate courts. The Supreme Court is the highest court in Mauritius and has supervisory powers over the subordinate courts. The Supreme Court is composed of the Chief Justice, the Senior Puisne judge, and Puisne judges.<sup>86</sup> The Chief Justice heads the judiciary and is appointed by the President acting after consultation with the Prime Minister.<sup>87</sup> The judges of the Supreme Court hold office until retirement at the age of sixty-seven. Appeals from the Supreme Court are heard in the Court of Civil Appeal and the Court of Criminal Appeal, both of which are divisions of the Supreme Court. The judges of the Court of Appeal are the judges of the Supreme Court.<sup>88</sup> The subordinate courts include the Intermediate Court, the Commercial Court, the Industrial Court, and the District Courts.<sup>89</sup> The Chief Justice also performs the functions of the President when the

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<sup>81</sup> Art. 60(2).

<sup>82</sup> Art. 60(4).

<sup>83</sup> *Noordally v Attorney-General & DPP* 1986 MR 204.

<sup>84</sup> *Mahboob v Government of Mauritius* 1982 MR 35.

<sup>85</sup> *Berenger v Governor General* 1973 MR 215.

<sup>86</sup> Art. 76(2) of the Constitution.

<sup>87</sup> Art. 77(1).

<sup>88</sup> Art. 80.

<sup>89</sup> Art. 82(1).

positions of President and Vice President are both vacant, when both are absent from Mauritius, or when they are otherwise unable to perform the functions of the office.<sup>90</sup>

Judges may only be removed from their office according to the Constitution. A judge may be removed from office by the President for inability to perform the function of his/her office (whether arising from infirmity of body or mind) or for misbehaviour following a referral to the Judicial Committee.<sup>91</sup> The Chief Justice may be removed due to inability or misbehaviour following the appointment of a tribunal by the President and subsequent referral to the Judicial Committee.<sup>92</sup> The office of a judge may only be abolished with his/her consent.<sup>93</sup>

## **V. Federalism/Decentralisation**

Rodrigues, an outer island belonging to Mauritius, has enjoyed autonomous status since 2001. The Rodrigues Regional Assembly consists of a Chairperson, who may be an elected member, and such other members as may be prescribed (there are currently eighteen members).<sup>94</sup> The Regional Assembly has the power to propose and adopt bills, which then become laws upon their adoption by the National Assembly in Mauritius. The Regional Assembly may also adopt regulations without the approval of the National Assembly.<sup>95</sup> These laws and regulations apply only to Rodrigues.<sup>96</sup>

Funds for development are made available to the Rodrigues Regional Assembly through the Rodrigues Consolidated Fund. The Fund consists of money appropriated by the National Assembly in Mauritius for the recurrent expenses of the Regional Assembly as well as revenue collected by the Regional Assembly.<sup>97</sup>

The provisions in this Chapter of the Constitution are entrenched. Any amendment requires the support of two-thirds of all members of the National Assembly, together with the concurrence of the Regional Assembly.<sup>98</sup> Any dispute between the regional and central government can be brought to the Supreme Court.<sup>99</sup>

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<sup>90</sup> Art. 28(7).

<sup>91</sup> Art. 78(2) and (3).

<sup>92</sup> Art. 78(4).

<sup>93</sup> Art. 76(2).

<sup>94</sup> Art. 75A.

<sup>95</sup> Art. 75B(1).

<sup>96</sup> Art. 75B(2).

<sup>97</sup> Art. 75D.

<sup>98</sup> Art. 75E.

<sup>99</sup> Art. 76.

## VI. Constitutional Adjudication

The Supreme Court of Mauritius has original interpretative and enforcement jurisdiction on constitutional questions. Two paths are provided for, depending on the Articles alleged to have been infringed. Should a person allege that Articles 3 to 16 (fundamental rights) are or are likely to be contravened in relation to him/her, that person may apply to the Supreme Court for redress.<sup>100</sup> The current practice in that regard has been elaborated above. Where a person alleges a contravention of the Constitution other than Articles 3 to 16 and a subsequent or likely prejudice to his/her interest, he/she may apply to the Supreme Court for a declaration and relief,<sup>101</sup> even though there may be other lawfully available action for the same matter. The Court's primary concern, in any case where a violation of the Constitution is alleged, is to ensure that redress is provided as conveniently and speedily as possible.<sup>102</sup>

It is the Court's duty to determine the validity of any statute which is alleged to be unconstitutional, as well as to determine whether the legislature has acted within the powers conferred upon it by the Constitution.<sup>103</sup> The Court will not, however, interfere in the internal business of Parliament unless an infringement of a constitutional principle is involved.<sup>104</sup>

Where a question relating to the interpretation of the Constitution arises in a court other than the Court of Appeal, the Court Martial, or the Supreme Court, and that court believes the question involves a substantial question of law, the question shall be referred to the Supreme Court.<sup>105</sup> The Supreme Court rules on the constitutional question and the subordinate court then disposes of the case in accordance with that decision, or any decision reached on appeal from the Supreme Court.<sup>106</sup> An appeal from the Supreme Court or the Court of Appeal lies as of right to the Judicial Committee in cases related to the interpretation of the Constitution.<sup>107</sup>

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<sup>100</sup> Art. 17(1).

<sup>101</sup> Art. 83(1).

<sup>102</sup> *Vallet v Ramgoolam* 1973 MR 29.

<sup>103</sup> *Ibid.*

<sup>104</sup> *Berenger v Jeewoolall* 1999 MR 172; *Lincoln v Governor-General of Mauritius* 1973 MR 290.

<sup>105</sup> Art. 84(1).

<sup>106</sup> Art. 84(2).

<sup>107</sup> Art. 81(1).

## VII. International Law and Regional Integration

### A International treaties

The Constitution is silent on the status of international law and regional integration except in Article 15(2)(b) which, in relation to the protection of freedom of movement, provides that the state must comply ‘with any international obligation of the government, particulars of which have been laid before the Assembly’. This Article implies that Mauritius has to incorporate the provisions of international law concerning freedom of movement for them to be binding.<sup>108</sup>

In relation to international law generally, Mauritian jurisprudence has established that norms in international treaties have to be translated into domestic laws through the adoption of legislation for them to be binding.<sup>109</sup> It has been held that ‘[a]ny international body does not begin regulating our activities under our concept of the nation state without its diktat having been incorporated upfront in our legislation’.<sup>110</sup> The provisions of a treaty are applicable for Mauritius only after the country has ratified or acceded to it.<sup>111</sup>

Mauritius is a dualist state and mere signature to a treaty does not make the provisions therein binding to Mauritius. The case of *Shaholia v Director General Mauritius Revenue Authority* established that even after signature, the government of Mauritius has to decide whether to incorporate the provisions of the treaty in its domestic laws or ‘reconsider or even repudiate the text’.<sup>112</sup> Therefore, the signature of a treaty does not confer upon the treaty’s provisions the force of law, although rules of interpretation require that domestic legislation does not conflict with a treaty to which the state is a party.<sup>113</sup>

The provisions of a treaty will have effect only after they have been made part of the domestic laws. The principles of separation of powers operate in this instance: the executive branch of the government signs the treaty and the legislative branch adopts laws to give effect to its provisions.<sup>114</sup> Although the Constitution does not set out the roles of the executive and of Parliament as to the applicability of the provisions of a treaty, it does state that Parliament is the law-making organ.

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<sup>108</sup> *Michael Rex Jordan v Marie Martine Jordan* 2000 SCJ 57.

<sup>109</sup> A. Budoo and R. Mahadew, ‘Country report: Mauritius’, *African Disability Rights Yearbook* (2014) 233.

<sup>110</sup> *Federation Mauricienne de Triathlon & anor v Hao Thyn Voon Ha Shun & ors* 2013 SCJ 158.

<sup>111</sup> *Matadeen v Pointu* Privy Council Appeal No 14 of 1997 paragraph 24; *Jordan v Jordan* 2000 SCJ 226; *Pulluck v Ramphul* 2005 SCJ 196; and *Ex Parte Hurnam Devendranath, a Barrister-at-Law* 2007 SCJ 289.

<sup>112</sup> 2008 SCJ 169.

<sup>113</sup> *Michael Rex Jordan v Marie Martine Jordan* 2000 SCJ 57.

<sup>114</sup> *Permal v Illois Trust Fund* 1984 MR 65.



## **B Customary international law**

The status of customary international law in Mauritius, however, is different. The case of *Jordan*<sup>115</sup> demonstrated that customary international law does not need to be domesticated, since those norms are laws recognised by all civilised nations and no specific procedure is necessary for them to be recognised by domestic courts.

## **C Regional bodies**

Mauritius is a member of regional integration bodies such as the Southern African Development States (SADC), the Indian Ocean Commission (IOC), and the Common Market for Eastern and Southern Africa (COMESA), among others. However, the Constitution contains no provisions in relation to the transfer of sovereign powers to regional bodies for integration purposes. Similar to the provisions of international treaties, the provisions of treaties for regional integration have to be incorporated into domestic law for them to have the force of law. Nevertheless, in the case of *Polytol Paints and Adhesives v Mauritius*, despite the fact that the state had not domesticated the provisions of the COMESA treaty within its territory, the COMESA Court of Justice found Mauritius in violation of its obligations under the treaty.<sup>116</sup> The motivation behind this decision was that the government's commitment in relation to tariffs applies to the country irrespective of whether it has domesticated the COMESA treaty. It is noteworthy that although Mauritius has appealed the decision, the current status of this case signifies that even if Mauritius does not domesticate the content of the COMESA treaty, it is still bound by its provisions if those provisions are central to the objective of regional integration.

## **VIII Conclusion**

The Constitution of Mauritius provides for civil and political rights and for the framework of the various branches of the government. Although the Constitution has ensured that Mauritius is a functioning democracy, it is still lacking in terms of protection of fundamental rights and freedoms of the individual.

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<sup>115</sup> *Michael Rex Jordan v Marie Martine Jordan* 2000 SCJ 57.

<sup>116</sup> *Polytol Paints & Adhesives Manufacturers Co Ltd v The Republic of Mauritius* COMESA Court of Justice No 1 of 2012 27.

Mauritius is a welfare state,<sup>117</sup> and it has stood out among other African states because of its ‘comprehensive social welfare system to which Mauritians have universal access’.<sup>118</sup> This implies that the country is ensuring that its population enjoys economic, social, and cultural rights. However, the exclusion of economic, social, and cultural rights from the Constitution leaves the population without any remedy in the event of non-fulfilment of those rights. At the international and regional levels, there has been a shift towards the inclusion of all rights into one instrument so victims can have recourse to remedies without any distinction between the categories of the rights in question. For instance, the African Charter makes commitments to ‘both individual and collective rights’ and this ‘reaffirms the interdependence of all human rights’.<sup>119</sup> The African Charter’s Preamble provides that African states are convinced of the following:<sup>120</sup>

that ... civil and political rights cannot be dissociated from economic, social and cultural rights in their conception as well as universality and that the satisfaction of economic, social and cultural rights is a guarantee for the enjoyment of civil and political rights.

The inclusion of all rights in the same instrument is indicative of the fact that the African Union believes that human rights are indivisible<sup>121</sup> and that every right is important. The decisions of the African Commission on violations of all categories of rights show that there is indeed no distinction between human rights in the African Union. For instance, in the case of *Free Legal Assistance Group and Others v Zaire*,<sup>122</sup> the African Commission found violations of a panoply of rights,<sup>123</sup> without distinguishing between the different generations of rights, including the right to life,<sup>124</sup> the right to dignity,<sup>125</sup> the right to liberty and security,<sup>126</sup> the right to a fair trial,<sup>127</sup> the right to freedom of conscience and religion,<sup>128</sup> the right to health,<sup>129</sup> and the right to education.<sup>130</sup>

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<sup>117</sup> See generally, for more information about how Mauritius functions as a welfare state, E. Phaahla, ‘The welfare state of Mauritius: A critical appraisal’ (2014) 107 *Global insight: A focus on current issues*.

<sup>118</sup> Phaahla (n117) 2.

<sup>119</sup> C. Baldwin and C. Morel, ‘Group rights’, in M. Evans and R. Murray (eds.), *The African Charter on Human and Peoples’ Rights: The system in practice 1986-2002* (2008) 244.

<sup>120</sup> African Charter, the Preamble, paragraph 8.

<sup>121</sup> F. Viljoen, ‘Introduction to the African Commission and the regional human rights system’, in C. Heyns (ed.), *Human rights law in Africa: Volume 1: International human rights law in Africa* (2004) 391.

<sup>122</sup> *Free Legal Assistance Group and Others v Zaire* (2000) AHRLR 74 (ACHPR 1995).

<sup>123</sup> *Ibid.*, paragraph 49.

<sup>124</sup> Art. 4 of the African Charter.

<sup>125</sup> Art. 5 of the African Charter.

<sup>126</sup> Art. 6 of the African Charter.

<sup>127</sup> Art. 7 of the African Charter.

<sup>128</sup> Art. 8 of the African Charter.

<sup>129</sup> Art. 16 of the African Charter.

<sup>130</sup> Art. 17 of the African Charter.

Having ratified the African Charter, Mauritius is obliged to ensure that economic, social, and cultural rights are included in its Constitution so that they are given the same status as civil and political rights. This has been recommended by the Committee on Economic, Social, and Cultural Rights in its concluding observations during the state reporting process.<sup>131</sup> The inclusion of economic, social, and cultural rights in the Constitution will also ensure that the population has a means of redress in the event that their economic, social, and cultural rights are violated.

As apparent from Section VII of this Note, the Constitution does not provide for the status of international law in the domestic courts. Mauritian jurisprudence has established that international and regional treaties have to be translated into domestic laws before they can be applied. As a result, this leaves limited choice for the population at the domestic level in the event of a violation of a right under a treaty which has not been incorporated into domestic laws. It is recommended that Mauritius incorporate an article in the Constitution that allows for the application of the provisions of a treaty once it has been ratified.

In summary, the Constitution of Mauritius, being the supreme law of the land, still lacks protections for the fundamental rights and freedoms of the individual. It is recommended that a constitutional amendment be undertaken to include aspects which would empower the instrument as a tool for the protection of human rights and the promotion of democracy.

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<sup>131</sup> A. Budoo 'Ensuring access to essential medicines through the inclusion of the right to health in the Mauritian Constitution' (2013), available at <http://africlaw.com/2013/03/05/ensuring-access-to-essential-medicines-through-the-inclusion-of-the-right-to-health-in-the-mauritian-constitution/> (accessed on 24 February 2016).

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