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Communication No. 1744/2007

Views adopted by the Committee at its 105th session (9–27 July 2012)

<i>Submitted by:</i>	Devianand Narrain et al.* (represented by counsel, Rex Stephen and Nilen D. Vencadasmy)
<i>Alleged victims:</i>	The authors
<i>State party:</i>	Mauritius
<i>Date of communication:</i>	16 November 2007 (initial submission)
<i>Document references:</i>	Special Rapporteur's rule 97 decision, transmitted to the State party on 13 December 2007 (not issued in document form) CCPR/C/94/D/1744/2007 – decision of admissibility, adopted on 6 October 2009
<i>Date of adoption of Views:</i>	27 July 2012
<i>Subject matter:</i>	Requirement for prospective candidates of elections to the National Assembly to identify themselves as members of one of the four categories of the Mauritian population
<i>Procedural issues:</i>	Non-exhaustion of domestic remedies; incompatibility with the provisions of the Covenant; abuse of the right of submission
<i>Substantive issues:</i>	Right to take part in political activity; freedom of thought, conscience and religion; right to equality before the law
<i>Articles of the Covenant:</i>	18; 25; 26
<i>Articles of the Optional Protocol:</i>	3 and 5, paragraph 2 (b)

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Annex

Views of the Human Rights Committee under article 5, paragraph 4, of the Optional Protocol to the International Covenant on Civil and Political Rights (105th session)

concerning

Communication No. 1744/2007**

Submitted by: Devianand Narrain et al. (represented by counsel, Rex Stephen and Nilen D. Vencadasmy)

Alleged victims: The authors

State party: Mauritius

Date of communication: 16 November 2007 (initial submission)

Date of admissibility decision: 6 October 2009

The Human Rights Committee, established under article 28 of the International Covenant on Civil and Political Rights,

Meeting on 27 July 2012,

Having concluded its consideration of communication No. 1744/2007, submitted to the Human Rights Committee on behalf of Devianand Narrain et al. under the Optional Protocol to the International Covenant on Civil and Political Rights,

Having taken into account all written information made available to it by the authors of the communication and the State party,

Adopts the following:

Views under article 5, paragraph 4, of the Optional Protocol

1.1 The authors of the present communication, dated 16 November 2007, are Devianand Narrain (born in 1960), Adrien Georges Laval Legallant (born in 1960), Jean François Chevathyan (born in 1960), Ian Harvey Jacob (born in 1975), Paveetree Dholah (born in 1959), Rolando Denis Marchand (born in 1966), Dany Sylvie Marie (born in 1973), Roody Yvan Pierre Muneean (born in 1985) and Ashok Kumar Subron (born in 1963). They are all Mauritian citizens and members of a political party called Rezistans ek Alternativ. The authors claim to be victims of a violation by the State party of articles 18, 25 and 26 of the Covenant. They are represented by counsel, Rex Stephen and Nilen D. Vencadasmy.

** The following members of the Committee participated in the examination of the present communication: Mr. Yadh Ben Achour, Mr. Lazhari Bouzid, Ms. Christine Chanet, Mr. Cornelis Flinterman, Mr. Yuji Iwasawa, Mr. Walter Kälin, Ms. Zonke Zanele Majodina, Ms. Iulia Antoanella Motoc, Mr. Gerald L. Neuman, Mr. Michael O'Flaherty, Mr. Rafael Rivas Posada, Sir Nigel Rodley, Mr. Fabián Omar Salvioli, Mr. Marat Sarsembayev, Mr. Krister Thelin and Ms. Margo Waterval.

1.2 On 6 October 2009, at its ninety-seventh session, the Committee declared the communication admissible insofar as it raised issues under articles 25 and 26 of the Covenant.

The facts as presented by the authors

2.1 The authors are members of a registered political party called Rezistans Ek Alternativ (Resistance and Alternative) and in that capacity they presented their candidacies for the general election to the National Assembly held on 3 July 2005.

2.2 On 30 May 2005, the authors submitted their nomination papers to the electoral authority of their constituencies. Their nomination papers were duly filled in, except for item 5 of part II, according to which they were requested to declare to which one of the four communities of the Mauritian population they belonged to. The First Schedule to the Constitution establishes a four-fold categorization of the Mauritian population: Hindu; Muslim; Sino-Mauritian; or General Population, for those who do not appear, from their way of life, to belong to one of the three communities.¹

2.3 The Constitution of the State party provides that the Assembly shall consist of 70 members.² The First Schedule to the Constitution, in paragraph 3(1), creates an obligation on every candidate in any general election to 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”. Moreover, paragraph 5 of the First Schedule to the Constitution holds that eight seats will be allocated under the “Best Loser System”. These eight seats will be distributed among the most successful candidate belonging to the appropriate community, as well as the most successful political party.³ Regulation 12, paragraphs 4 and 5, of the

¹ Paragraph 3 (4) of the First Schedule to the Constitution reads as follows: “For the purposes of this Schedule, the population of Mauritius shall be regarded as including a Hindu community, a Muslim community and 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.”

² According to the First Schedule to the Constitution, the 70 members of the National Assembly are elected as follows: (a) 62 members are returned on the basis of the principle of “first past the post” (20 constituencies returning three members each and one constituency in the autonomous region of the Island of Rodrigues returning two members); and (b) the remaining eight members are seats allocated under a mechanism known as the Best Loser System.

³ Paragraph 5 (3-4) of the First Schedule to the Constitution reads as follows: “(3) The first 4 of the 8 seats shall so far as is possible each be allocated to the most successful unreturned candidate, if any, who is a member of a party and who belongs to the appropriate community, regardless of which party he belongs to. (4) When the first 4 seats (or as many as possible of those seats) have been allocated, the number of such seats that have been allocated to persons who belong to parties, other than the most successful party, shall be ascertained and so far as is possible that number of seats out of the second 4 seats shall one by one be allocated to the most successful unreturned candidates (if any) belonging both to the most successful party and to the appropriate community or where there is no unreturned candidate of the appropriate community, to the most successful unreturned candidates belonging to the most successful party, irrespective of community.” Paragraph 5 (8) of the First Schedule to the Constitution: “The appropriate community means, in relation to the allocation of any of the 8 seats, the community that has an unreturned candidate available (being a person of the appropriate party, where the seat is one of the second 4 seats) and that would have the highest number of persons (as determined by reference to the results of the published 1972 official census of the whole population of Mauritius) in relation to the number of the seats in the Assembly held immediately before the allocation of the seat by persons belonging to that community (whether as members elected to represent constituencies or otherwise), where the seat was also held by a person belonging to that community: Provided that, in relation to the allocation of any seat, 2 or more communities have the same number of persons as aforesaid preference shall be given to the

National Assembly Election Regulations 1968 provides that every candidate of a general election must make and subscribe to, in his nomination paper, inter alia, a declaration “as to which of the Hindu, Muslim, Sino-Mauritian or General Population he belongs”, and that in the event such a declaration is not made the nomination shall be deemed to be invalid.

2.4 In their nomination papers, the authors did not make the required declaration. They claim that they were, have always been, and still are, unable to categorize themselves in the prescribed compartments, i.e. as belonging either to the Hindu, Muslim, Sino-Mauritian or General Population community. They further claim that they were and still are unaware of the criteria “way of life”, as suggested by the First Schedule to the Constitution, that would qualify them to be or not to be of the Hindu, Muslim or Sino-Mauritian community. They remain consequently unable to decide whether they could classify themselves in the residual community called General Population, the more so that they were equally unaware of the criteria “way of life” that would qualify them to be or not to be in the General Population community. The authors add that since the population census of 1972, the four-fold categorization of the population has no longer been used for censuses.

2.5 On 30 May 2005, the authors’ nominations and candidatures were declared invalid on the ground of their failure to comply with regulation 12, paragraph 5, of the National Assembly Elections Regulations 1968.

2.6 On 10 June 2005, the Supreme Court ordered the electoral authorities to insert the authors’ names on the list of eligible candidates. The Supreme Court decided that regulation 12, paragraph 5, of the National Assembly Elections Regulations 1968 is repugnant to Section 1 of the Constitution proclaiming that Mauritius is a democratic State. The Supreme Court further held that the right to stand as a candidate at general elections is so fundamental for the existence of a true democracy that it cannot be tampered with, and that regulation 12, paragraph 5, of the National Assembly Elections Regulations 1968 had been unlawfully enacted. As a result, the authors could stand as candidates at the general election on 3 July 2005. However, none of them was successfully returned or eligible to be considered under the Best Loser System.

2.7 In the light of the Supreme Court decision of 10 June 2005 in favour of the authors, the Electoral Supervisory Commission started proceedings before the Supreme Court asking for direction as to how to apply the provisions of paragraph 3 of the First Schedule to the Constitution to prospective candidates who fail to declare on their nomination paper which community they belong to. Counsel for the authors submitted an amicus curiae brief in these proceedings. On 10 November 2005, the Supreme Court ruled that there is a legal obligation for prospective candidates at general elections to declare on their nomination papers the communities to which they belong, failing which their nomination papers would be invalid.

2.8 The authors, who were not a party to the case, challenged the Supreme Court judgment of 10 November 2005 under a procedure known as *tierce opposition*. They claimed that this judgment infringed their constitutional rights. On 7 September 2006, the Supreme Court dismissed the authors’ application for tierce opposition. It held that the tierce opposition procedure does not apply in constitutional matters, and that the authors had not shown that they suffered real prejudice, actual or potential. It also noted that the authors could file an application for special leave to the Judicial Committee of the Privy Council against the Supreme Court’s determination in the 10 November 2005 ruling. On 25 September 2006, the authors sought from the Supreme Court leave to appeal to the Judicial

community with an unreturned candidate who was more successful than the unreturned candidates of the other community or communities (that candidate and those other candidates being persons of the appropriate party, where the seat is one of the second 4 seats).”

Committee of the Privy Council. On 14 March 2007, the Supreme Court refused to grant leave to appeal, under section 81, paragraphs 1 (a) and 2 (a), of the Constitution, holding that the judgment of 7 September 2006 did not concern the interpretation of any provisions of the Constitution. It recalled that the applicants, in order to make an application by way of tierce opposition had to do so by an *action principale*, i.e. a plaint with summons, and had to show that they had suffered prejudice, actual or potential.

The complaint

3.1 The authors claim that regulation 12, paragraph 5, of the National Assembly Elections Regulations 1968, to the extent that it invalidates the nomination of a candidate to a general election who does not declare to which of the Hindu, Muslim, Sino-Mauritian or General Population communities he allegedly belongs, violates article 25 of the Covenant. They add 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. The authors submit 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.

3.2 The authors maintain 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. Compelling citizens to declare themselves as belonging to a specific community could lead to dangerous dynamics. They further maintain that the absence of categorization of candidates does not affect the operation of the Best Loser System, for which it was designed, as the only consequence for a candidate without categorization would be to lose his entitlement to be returned under that system.

3.3 The authors argue that by sanctioning persons who are unable or unwilling to categorize themselves on the basis of an arbitrary criterion, such as a person’s way of life, the law unjustifiably discriminates against them. They maintain that this would amount to a violation of article 26 of the Covenant.

3.4 The authors claim that the compulsory classification requested by the State party for purposes of elections to the National Assembly deprives them, in violation of article 18 of the Covenant, of their right to freedom of thought, conscience and religion.

State party’s observations on admissibility

4.1 On 22 April 2008, the State party requested that the admissibility of the communication be considered separately from the merits. It recalls that the authors were not prevented from standing as candidates for the general elections of June 2005. It considers that the communication should be declared inadmissible for the authors’ failure to exhaust all domestic remedies, for incompatibility with the provisions of the Covenant and for abuse of the right of submission.

4.2 The State party submits that the authors failed to exhaust domestic remedies, as they did not apply to the Supreme Court under section 17 of the Constitution, available for any person alleging that his fundamental rights or freedoms have been contravened. The State party explains that a Supreme Court decision under section 17 of the Constitution can thereafter be appealed to the Judicial Committee of the Privy Council. The State party recalls that the authors’ application by way of tierce opposition failed because this

procedure does not apply in constitutional matters and the authors failed to show that they suffered any real prejudice, actual or potential. It further recalls that the authors' application to seek leave to appeal to the Judicial Committee of the Privy Council was dismissed on the same grounds.

4.3 The State party contends that the communication is incompatible with the provisions of the Covenant. It explains the rationale behind the complex election system, which is to guarantee the representation of all ethnic communities. Therefore, it believes that what is being sought in the present communication is itself incompatible with the provisions of the Covenant, since, in view of the multi-ethnic and multi-religious composition of the State party's population, the abolishment of the requirement for a prospective candidate to declare the community to which he belongs to could in fact result in discrimination on the grounds of race, religion, national or social origin. It also notes that the current election system is being reviewed by the Government. The Prime Minister has stated that he considers the Best Loser System to have outlived its usefulness, even though it has served well.

4.4 The State party argues that the communication amounts to an abuse of the right of submission. It recalls that the authors could stand as candidates at the general election in 2005 and were thus not denied that right. Moreover, they are not candidates for any pending election, i.e. there is no live issue before the Committee now.

Authors' comments on the State party's observations on admissibility

5.1 On 19 June 2008, the authors contested the State party's observation on their failure to exhaust domestic remedies and underlined that an application under section 17 of the Constitution would have been futile. As the Committee concluded in *Gobin v. Mauritius*, in the absence of the incorporation of the provisions of the Covenant into national law, the domestic courts do not have the power to review the Constitution to ensure its compatibility with the Covenant.⁴ The authors further underline that the Supreme Court, in its rejection of the authors' application for leave to appeal to the Judicial Committee of the Privy Council, itself held that the judgement did not concern the interpretation of any provisions of the Constitution.

5.2 The authors maintain that the State party implicitly admits to the inherent flaws and defects of the Best Loser System it seeks to defend. They argue that the Best Loser System does not afford fair and adequate representation, as the allocation of the eight additional seats in the National Assembly is based on census figures of 1972 and no longer reflects reality. They add that the imposition of classification for prospective candidates imposes an unreasonable restriction on them.⁵ The criterion which forms the basis of the classification is "way of life", which is not defined by the Constitution or by law. It is vague, amorphous and cannot constitute the basis for determining the eligibility of a prospective candidate.⁶

⁴ Communication No. 787/1997, *Gobin v. Mauritius*, decision of inadmissibility adopted on 16 July 2001, para. 6.2.

⁵ See general comment No. 25 (1996) on the right to participate in public affairs, voting rights and the right of equal access to public service (*Official Records of the General Assembly, Fifty-first Session, Supplement No. 40*, vol. I (A/51/40 (Vol. I)), annex V), para. 4.

⁶ See *Carrimkhan v. Tin How Lew Chin and ors* of 2000 (SCJ 264), in which a local court held that "way of life may depend on a series of factors – the way one dresses, the food one eats, the religion one practises, the music one listens to, the films one watches. ... The issue further arises as to how the judge can determine the way of life of a citizen unless he becomes Big Brother in G. Orwell's novel *1984* and watches how a citizen leads his private life. One may also change one's way of life from one election to the other. Our attention was drawn to the fact that a way of life can also be dependent

5.3 The authors contest the State party's argument that their communication is an abuse of the right of submission, inasmuch as their right to stand in the general elections of June 2005 was derived from a court decision, which was subsequently overruled.

Additional observations by the State party

6. On 5 August 2008, the State party submitted that the communication *Gobin v. Mauritius*⁷ is to be clearly distinguished from the present communication. In the present matter the authors allege violations of their fundamental rights pertaining to freedom of expression, religion, culture and conscience, which are guaranteed under sections 11 and 12 of the Constitution. The means for redress whenever fundamental rights are being or are likely to be contravened cannot be but by way of a claim under section 17 of the Constitution. Furthermore, following the refusal of leave to appeal to the Judicial Committee of the Privy Council in relation to the judgment of the Full Bench of the Supreme Court delivered on 7 September 2006, the authors did not avail themselves of a further remedy inasmuch as they did not apply for special leave to the Judicial Committee of the Privy Council as provided for under section 81, paragraph 5, of the Constitution.⁸

Decision of the Committee on admissibility

7.1 On 6 October 2009, at its ninety-seventh session, the Committee considered the admissibility of the present communication.

7.2 The Committee noted the State party's argument that the authors failed to exhaust domestic remedies, as they neither applied to the Supreme Court under section 17 of the Constitution, nor sought leave to appeal to the Judicial Committee of the Privy Council to address their claim pertaining to their freedom of thought, conscience and religion.

7.3 With regard to the authors' claim under article 18 of the Covenant, the Committee observed that the State party's Constitution contains a similar provision, and that claims alleging its violation can be raised before the Supreme Court and the Judicial Committee of the Privy Council, as noted by the State party. The Committee noted that the authors failed to lodge a constitutional complaint before the Supreme Court with regard to the alleged violation of their freedom of thought, conscience and religion, and concluded that the authors failed to exhaust domestic remedies to address their claim under article 18 of the Covenant. This claim is thus inadmissible under article 5, paragraph 2 (b), of the Optional Protocol.

7.4 With regard to the authors' claims under articles 25 and 26 of the Covenant, the Committee considered that in the light of the State party's Supreme Court decision of 10 November 2005 overruling its earlier decision in favour of the authors, of the constitutional provision about the division of the parliament seats according to affiliation to communities, and of the State party's Supreme Court view holding that only the legislative branch can amend the Constitution, the authors did not have further domestic remedies available. Accordingly, the Committee found that article 5, paragraph 2 (b), of the Optional Protocol did not preclude its examination of this part of the communication.

on class distinction, for a rich Hindu and a rich Sino-Mauritian may have a similar way of life, depending on their financial means, whereas a rich Hindu and a poor Hindu may lead altogether different ways of life."

⁷ Footnote 4 above.

⁸ Section 81 of the Constitution establishes the procedure of appeal to the Judicial Committee. Paragraph 5 indicates that nothing in the section "shall affect any right of the Judicial Committee to grant special leave to appeal from the decision of any court in any civil or criminal matter".

7.5 With regard to the State party's claim that the communication is incompatible with the provisions of the Covenant, the Committee recalled that the Optional Protocol provides for a procedure under which individuals can claim that their rights set out in part III of the Covenant, article 6 to 27 inclusive, have been violated. In the present communication, the authors allege violations of articles 25 and 26 of the Covenant. Insofar as the facts of the communication raise potential issues under these articles, the Committee considered the claims compatible *ratione materiae* with Covenant provisions and thus admissible.

7.6 The Committee further noted the State party's contention that the authors raised a hypothetical violation of articles 25 and 26 of the Covenant, as their rights were not infringed during the last general election and they were not candidates in any pending election. It also noted the authors' argument claiming that the Supreme Court decision of 10 November 2005, insisting on the requirement of community affiliation, would effectively bar them from running as candidates of forthcoming general elections. Considering the authors' effective participation in the parliamentary elections in 2005, the Committee noted that they had not substantiated any past violation of their rights protected under the Covenant. Nonetheless, considering the authors' refusal to include themselves in any of the community affiliations, the Committee concluded that in the light of the Supreme Court ruling of 10 November 2005, the authors were effectively precluded from participating in any future elections.⁹ It considered that the authors had sufficiently substantiated, for purposes of admissibility, their status as victims and their claims under articles 25 and 26 of the Covenant. It therefore declared the communication admissible insofar as it raised issues under articles 25 and 26 of the Covenant.

State party's observations on admissibility and merits

8.1 On 3 May 2010, the State party submitted its observations on the admissibility and the merits. In accordance with rule 99, paragraph 4, of the Committee's rules of procedures, the State party requested that the admissibility be reviewed on the basis of its previous submissions on admissibility.

8.2 On the merits, the State party submits that, pursuant to paragraph 3 (1) of the First Schedule to the Constitution, there is a legal obligation on a candidate for general elections to declare his community and that the candidate's declaration does not merely serve to determine his own eventual eligibility but it is required for the purposes of determining the "appropriate community" in order to allocate the additional eight seats among the unreturned candidates. The authors, by refusing to declare their community, are impeding the democratic process provided for under the Constitution and preventing the Electoral Supervisory Commission from performing its duty.

8.3 With regard to the concept of "way of life", the State party argues that constitutions are bound to be broad and that it is clear from paragraph 3 (4) of the First Schedule¹⁰ that the General Population community was meant to be a residual category comprising those who are neither Hindu, Muslim or Sino-Mauritian. The State party submits that, in the circumstances that the mandatory nature of the declaration as to a candidate's community was to be understood as a restriction on a candidate's right to stand for elections, this restriction is justifiable based on objective and reasonable criteria¹¹ and is neither arbitrary nor discriminatory. Therefore, neither article 25 nor 26 of the Covenant are violated.

⁹ See communication No. 488/1992, *Toonen v. Australia*, Views adopted on 31 March 1994, para. 5.1.

¹⁰ See footnote 1.

¹¹ General comment No. 25, para. 15.

Authors' comments on the State party's observations

9.1 On 15 June 2010, the authors informed the Committee that general elections for the National Assembly were held on 5 May 2010. The authors' political party, Rezistans ek Alternativ, contracted an alliance, which was named Platform Pou Enn Nouvo Konstitisyon: Sitwayennte, Egalite ek Ekoloji (PNK). A total of 60 candidates of the PNK did not declare their community in accordance with the provisions of paragraph 3 (4) of the First Schedule of the Constitution and their nomination papers were declared invalid. According to the figures published by the Electoral Supervisory Commission, out of 545 candidatures, 104 were declared invalid for lack of community declaration.

9.2 On 21 April 2010, the authors and other candidates of the PNK, as well as other citizens whose candidatures had been declared invalid, filed an application to the Supreme Court requesting that their names be inserted into the lists of candidates for the general election. On 30 April 2010, the Supreme Court in its judgement *Dany Sylvie Marie and others v. The Electoral Commissioner and others* (SCR 104032) dismissed the application on the ground that it was bound by the decision of the Full Bench of the Supreme Court dated 10 November 2005 in the Narrain case. Nevertheless, the single judge held that section 1 of the Constitution is the most authoritative provision of the Constitution and therefore all provisions of the Constitution must comply with section 1, which includes the right to stand as a candidate. This right should have precedence over the right to the allocation of best-loser seats, which is a protection afforded to minorities in the First Schedule. The judge endorsed the reasoning of Judge Balancy in *Narrain and others v. The Electoral Commissioner and others* of 2005 (SCJ 159), that disqualifying an otherwise qualified person from standing as a candidate on the sole ground that he failed to declare his community imposed an unreasonable and unjustifiable restriction on his fundamental right.

9.3 Regarding the State party's observations on merits, the authors strongly object to the accusation that by refusing to declare their community they have deliberately impeded the democratic process and prevented the Electoral Supervisory Commission from performing its constitutional duty.

9.4 The authors comment on the State party's observation that the candidate's declaration as to community does not merely serve to determine the candidate's own eventual eligibility but is also required for the purposes of determining the "appropriate community" in order to allocate the eight additional seats among the unreturned candidates (Best Loser System). They claim that the provision of the eight additional seats has not always been fulfilled. In 1982, 1991 and 1995, only four out of the eight nominations could be made and in 2010, the mechanism could only fill seven seats.

9.5 The authors submit that they do not dispute the constitutional status of the Best Loser System and that the system was devised to provide a balanced communal or ethnic representation in Parliament. However, they dispute that the criterion of classification "way of life" has any objective significance and that the system rests on population figures of 1972. Therefore, the authors submit that the system no longer fulfils its declared objective and is thus no longer vital to democracy.

9.6 With regard to the alleged violation of article 25 of the Covenant, the authors recall the Committee's general comment No. 25 and reiterate that their disqualification to stand as candidates because of their failure to comply with an ethnic-based classification is neither objective nor reasonable.

9.7 As regards the alleged violation of article 26, the authors contend that their refusal to participate in a supplemental election system of the nomination of eight members cannot democratically justify their exclusion from the main electoral process. As a result, the

authors consider that they are being discriminated against because of their opinion, political or otherwise, in not classifying themselves under one of the four ethnic-based categories.

9.8 In view of the preceding comments, the authors find no justification in the State party's invitation that the Committee review its decision on admissibility.

The parties' further observations

10. On 11 October 2010, the State party submitted further observations and informed the Committee that the authors and other parties had, on 23 June 2010, applied to the Judicial Committee of the Privy Council for permission to appeal the Supreme Court judgment of 30 April 2010. This decision remains pending.

11. On 24 February 2011, the authors submitted further comments and confirmed that the authors and other candidates whose candidatures had been declared invalid applied to the Judicial Committee of the Privy Council for special leave to appeal against the Supreme Court decision *Dany Sylvie Marie and others v. The Electoral Commissioner and others* (SCR 104032). They submit that this matter is different from the communication submitted to the Committee, albeit dealing with the same substantial issue, i.e. the right of a Mauritian to stand as a candidate at general elections without having to submit to the requirement for communal classification. The matter is different inasmuch as the parties are different; the cause of action is different, the one before the Committee originates from the 2005 general elections, while the one pending before the Privy Council stems from the 2010 general elections; the communication before the Committee invokes violations of the Covenant, in particular article 25, which provisions are not expressly provided for under the Constitution and therefore not enforceable by national courts. The authors argue that a recurrence of a violation of the provisions of the Covenant during the general elections of 2010 while the authors' communication was still under consideration by the Committee cannot invalidate the procedure which results from the previous violation during the 2005 general elections, even though domestic remedies are available to dispute the recurring violation.

12. On 14 June 2011, the State party submitted further observations on the authors' comments of 24 February 2011. It states that its observations of 11 October 2010 were purely factual and that the authors' allegation that it acted in "bad faith" is unwarranted. The State party notes that the authors admit that the present communication before the Committee deals with the same substantial issue as the one before the Judicial Committee of the Privy Council, irrespective of the different rights alleged to be infringed before the Committee and the Judicial Committee of the Privy Council.

13. On 31 January 2012, the authors informed the Committee that the Judicial Committee of the Privy Council had delivered its judgment in the matter of *Dany Sylvie Marie and others v. The Electoral Commissioner and others*, on 20 December 2011. The Council held that procedurally it had no jurisdiction to determine the matter and therefore refused the application for special leave. In the light of this pronouncement the authors contend that an aggrieved citizen whose candidature is refused for want of the "community" declaration is at a loss as regards the availability of any effective domestic legal remedy which will enable him or her to seek redress in an effective manner, inasmuch as: (a) any judge called upon in future to determine a complaint following the rejection of a candidature shall be bound by the decision of the Full Bench in *Electoral Supervisory Commission v. The Hon. Attorney General 2005* (SCJ 252); (b) the Judicial Committee of the Privy Council has held that the decision of such a judge is not subject to any appeal.

Issues and proceedings before the Committee

Review of the decision on admissibility

14.1 The Committee takes note of the State party's request that, pursuant to article 99, paragraph 4, of its rules of procedure, it reconsider its admissibility decision of 6 October 2009 and find the communication inadmissible on the grounds that the authors have failed to exhaust domestic remedies, that the communication is incompatible with the provisions of the Covenant and that it constitutes an abuse of the right of submission. It further notes that the authors' and other parties' application to the Judicial Committee of the Privy Council remained pending at the time of the submission of its observations. It notes the authors' arguments claiming that the matter before the Judicial Committee of the Privy Council is different from their communication before the Committee, as the parties are different, the issue before the Committee originated from the 2005 general elections and not from the 2010 elections and the provisions of the Covenant are not enforceable by national courts. It also notes the State party's argument that despite the different rights invoked before the Committee and the Judicial Committee of the Privy Council, the cause of the violation appears to be the same, namely the requirement of communal classification. The Committee notes that the Supreme Court, in its decision of 30 April 2010, despite expressing some inclination to concur with the Supreme Court decision of 10 June 2005 in favor of the authors, rejected the authors' and other parties' application on the grounds that the court was bound to the conclusions of the Full Bench of the Supreme Court of 10 November 2005, which held that only the legislative branch can amend the Constitution.

14.2 The Committee further notes that in its judgement of 20 December 2011 the Judicial Committee of the Privy Council declared that it had no jurisdiction to determine the matter in the case of *Dany Sylvie Marie and others v. The Electoral Commissioner and others*. The Committee recalls its conclusion in its admissibility decision of 6 October 2009 and considers that the State party's observations or arguments do not lead to a reconsideration of the Committee's admissibility decision. Accordingly, the Committee reiterates that the communication is admissible, insofar as it raises issues under articles 25 and 26 of the Covenant, and proceeds to its examination on the merits.

Consideration of merits

15.1 The Human Rights Committee has considered the present communication in the light of all the information made available to it by the parties, as required under article 5, paragraph 1, of the Optional Protocol.

15.2 The Committee notes the authors' claim that they are unable to categorize themselves into any one of the four communities: Hindu, Muslim, Sino-Mauritian or General Population because the criterion "way of life", which serves as the basis for the classification, is vague and not defined by law. It also notes that, given the authors' unawareness of the criterion "way of life" under the First Schedule to the Constitution, they are unable to decide in which community they should classify themselves. It notes that the authors consider the imposition of classification for prospective candidates to constitute an unreasonable restriction on them. The Committee further takes note of the State party's explanation that the rationale behind the complex election system is to guarantee the representation of all ethnic communities. It also notes the State party's argument that a candidate may not voluntarily decline to make a declaration as to the community, since the candidate's declaration is required for the purposes of determining the "appropriate community" in order to allocate the additional eight seats among unreturned candidates.

15.3 The Committee observes that the right to stand for election is regulated in the Constitution and in the First Schedule to the Constitution, which contains provisions on the Best Loser System. It also notes that the First Schedule refers to the 1972 official census

regarding the number of members in the four communities. It also notes the information provided by the State party to the effect that the system was originally devised with a view to providing a balanced communal or ethnic representation in Parliament.

15.4 With regard to the alleged violation of the authors' right to stand for election, the Committee recalls its jurisprudence and general comment, namely that any conditions which apply to the exercise of the rights protected by article 25 should be based on objective and reasonable criteria.¹² 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.¹³ Therefore, the Committee has to determine whether the mandatory requirement to declare a candidate's community affiliation is based on objective, reasonable criteria, which are neither arbitrary nor discriminatory.

15.5 The Committee observes that in the absence of any classification, a candidate is effectively barred from standing for general elections. It notes the State party's argument that the category General Population is the residual category comprising those who neither are Hindus, Muslims or Sino-Mauritians. According to the First Schedule to the Constitution, the additional eight seats under the Best Loser System are allocated giving regard to the "appropriate community", with reliance on population figures of the 1972 census. However, the Committee notes that community affiliation has not been the subject of a census since 1972. The Committee therefore finds, taking into account the State party's failure to provide an adequate justification in this regard and without expressing a view as to the appropriate form of the State party's or any other electoral system, that the continued maintenance of the requirement of mandatory classification of a candidate for general elections without the corresponding updated figures of the community affiliation of the population in general would appear to be arbitrary and therefore violates article 25 (b) of the Covenant.

15.6 In the light of this conclusion, the Committee decides not to examine the communication under article 26 of the Covenant.

16. The Human Rights Committee, acting under article 5, paragraph 4, of the Optional Protocol to the International Covenant on Civil and Political Rights, is of the view that the facts before it disclose a violation of the rights of the authors under article 25 (b) of the Covenant.

17. In accordance with article 2, paragraph 3 (a), of the Covenant, the State party is under an obligation to provide the authors with an effective remedy, including compensation in the form of reimbursement of any legal expenses incurred in the litigation of the case, to update the 1972 census with regard to community affiliation and to reconsider whether the community-based electoral system is still necessary. The State party is under an obligation to avoid similar violations in the future.

18. Bearing in mind that, by becoming a party to the Optional Protocol, the State party has recognized the competence of the Committee to determine whether there has been a violation of the Covenant or not and that, pursuant to article 2 of the Covenant, the State party has undertaken to ensure to all individuals within its territory or subject to its jurisdiction the rights recognized in the Covenant and to provide an effective and enforceable remedy in case a violation has been established, the Committee wishes to

¹² See communications No. 500/1992, *Debreczeny v. Netherlands*, Views adopted on 3 April 1995; No. 44/1979, *Pietraroia v. Uruguay*, Views adopted on 27 March 1981; general comment No. 25, para. 4.

¹³ General comment No. 25, para. 15.

receive from the State party, within 180 days, information about the measures taken to give effect to the Committee's Views. The State party is also requested to publish the Committee's Views and to have them widely disseminated in the official languages of the State party.

[Adopted in English, French and Spanish, the English text being the original version. Subsequently to be issued also in Arabic, Chinese and Russian as part of the Committee's annual report to the General Assembly.]
