

Professor Tarun Khaitan

Interview



Let's start with the broad agenda of constitutional reform, what are the main issues regarding Mauritius that we need to tackle?

My understanding is that there are four main issues with constitutional reform in Mauritius. Now, everything I say is with the caveat that I don't understand the context particularly well. I'm a student of Mauritius for all of one week at most. So take everything I say about you and your country with a pinch of salt.

No, I won't because what you're going to say will be based on your research on constitutional reforms in other countries. Of course.

There are things in common with other countries, aren't there? Like one of the most dividing issues here: the Best Loser System (BLS).

I've been teaching the BLS of Mauritius for a few years at LSE in my course on Constitutionalism in the Global South. And the BLS can be seen as part of a family of very common constitutional mechanisms that deeply divided the societies that adopted it. What do I mean by a deeply divided society? A society in which certain ethnic divisions, whether of religion, caste, race or language are so important that they end up having an impact on how people vote and on what the political system looks like.

So, ethnic divisions become political in character...

Indeed! And with those deep divisions, in a democracy, minority ethnic groups fear that under a majoritarian process, they will be locked out of political power, that they will basically become permanent losers of the electoral system.

Are those fears justified?

Yes. In most cases, they are justified because in a pluralist country where people have different ethnicities, though these ethnicities are not politically salient, you can be a minority and still vote in shifting coalitions, as long as those political coalitions don't track ethnic identities. But when ethnicities matter politically, then the fears of a political knockout are genuine. So the kind of mechanisms that countries tend to adopt are broadly a political insurance.

By the constitution makers?

Yes. The constitution makers give an insurance policy to the minority groups that go along these lines: "We are guaranteeing a modicum of power sharing to you. Democracy will not overwhelm you". This can take multiple forms.

The BLS in our case is one of them. What other forms of 'insurance policy' are there?

Several. Northern Ireland, for example, has a community veto system. In Lebanon, you had a system where different communities took turns to hold the presidency. In some countries, the Deputy Prime Minister or President has to be from a different community from the current President.

Coming back to Mauritius' BLS, you do know why it is controversial, don't you?

Yes. What I understand is there are two distinct problems. One is a specific problem that has to do with its design: it gives political insurance to some ethnic minorities but not others, in particular, the Creole community. People with African ancestry feel that being included in the general category in the BLS does not ensure adequate or fair representation for them. Now that is, at least theoretically, a problem that can be easily solved.

How?

By creating a distinctive Creole category.

As Mauritius embarks on an important national conversation around electoral reform, the University of Mauritius, in collaboration with the Mauritius LSE Society Trust Fund, the National Human Rights Commission and the UoM Law Society and Alumni, hosted a timely public lecture and panel discussion on "Constitutionalism in Mauritius" this week. We took the opportunity to interview the keynote speaker, Professor Tarun Khaitan, Chair of Public Law at the London School of Economics and Political Science, an eminent scholar whose work on constitutionalism has shaped debates well beyond the United Kingdom. In this interview, Professor Khaitan reflects on the principles that underpin a resilient constitutional order, the lessons Mauritius can draw from comparative experiences and how reforms can best safeguard both fairness in representation and the integrity of democratic institutions.

Interview by Touria PRAYAG

Rethinking Representation: Electoral Reform in Mauritius

So, instead of four, we have five categories, right? But the more serious problem is that while this kind of ethnicity-based power sharing guarantees a political insurance to the minority, doesn't it also entrench these ethnic identities by baking them into the system?

The way around that is through a voting system similar to the one Australia has been using for a very long time and which increasingly other countries like the United States are adopting. It's called the Ranked Choice Vote (RCV).

How does that work in concrete terms?

Let me just explain what the RCV system is and then I'll say how minorities benefit from it. In a RCV, voters are either permitted or required to rank their top two or top three candidates. Now, in the first round of counting, the candidate who receives the lowest number of first-ranked votes is eliminated, and her second choice votes are distributed to the other candidates.

The process continues until one candidate crosses the 50% threshold or there's a last candidate standing and every other candidate has been eliminated.

How is this better than First Past the Post?

In this system, a winning candidate gets close to or over 50% before they win, unlike the First Past the Post (FPTP) where a candidate can get only 30% and still win.

So, it's more representative. But how is it good for minorities?

First, it forces all the big parties to cater to voters who are not their own voters. So every party gets an incentive in the system to tell voters of other parties, "you may not love us, but can you tolerate us by putting us down as number two?"

Why would voters do that?

They would if the party has certain policies that favour the voters of other parties.

But can't you do that in any system? I mean, even here, there's no political party that can face the electorate without including a wide range of ethnicities amongst their candidates. So what would be different?

Two things are different. In a multi-party system where you have a FPTP mood, parties are very calculating about the target. The usual target in a multi-party system, I'm not sure about Mauritius, it's between 30 and 40% of the vote.

Now, you build coalitions, but you build community-based coalitions. This means that one party may easily decide that the Hindu vote and the Muslim vote are enough for me to cross that threshold. I don't necessarily need to cater to the other parties.

Not in Mauritius. It hasn't happened.

No, it hasn't happened. But what RCV system does is that if a party, for whatever reason, has a vote base that is trapped in particular community groups, it would still require an appeal that is very broadly shared. So basically, it's a majoritarian system like the FPTP but it just broadens the tent. So, the FPTP already requires parties to build broad tents. This system puts an even bigger pressure and requires parties to build an even larger tent, to be even more inclusive in their appeal to voters on the margins because little differences in second-choice voting can make a difference to who gets through. And you're very lucky in that you don't have communal parties.

They're marginal.

They're marginal because you have a majoritarian system. If you were to adopt a Proportional Representation system...

Yes, let's talk about the Proportional Representation (PR) because it keeps coming up as an alternative to FPTP or, at least, a dose of PR is being suggested to avoid situations where one party or one coalition sweeps all the seats.

The problem with PR is that it will increase sectarianism in your politics. The parties that are marginal at the moment are likely to become more powerful. And the logic is very simple. If you're a political entrepreneur in a crowded field where there are many political parties, the easiest way for you to gain that 10, 15 or 20% of the vote share is through PR. Then you become a kingmaker because under PR, coalitions are essential. PR in the system increases the centrifugal force, the force that pushes parties to the margins. RCV exerts an even stronger centrifugal force. But the difference is that RCV squeezes the smaller parties less than FPTP. That is why it's a good compromise between PR and FPTP.

What about choosing FPTP and introducing a dose of PR?

That mix is a hybrid system. Many countries have thought, well, PR is good because it increases representation and FPTP is good because it creates stable and effective governments, so let's join them.

Hasn't it worked?

No, it hasn't. Lots of countries in Europe, like Germany, and Italy have mixed systems and depending on the method by which you do the mixing, one of the two elements dominates. Either the proportionality element dominates or the FPTP system does. In Europe, it's mainly proportionality that dominates. So if you're a minority voter and you really like a small party, under FPTP you are forced to vote strategically. If your party is not a player at all in your district, you have to vote for the big party. Or you vote for that party and actually hurt the big party that is ideologically closest to you. So if you actually stick to your main preference, you end up helping the ideology you oppose.

But the drawback of FPTP is not just the lack of representation of minorities. The biggest drawback is that it does not translate the will of the people. So how do you deal with that?

The best way to get a system that can yield both an effective government and be representative is to try to mix the electoral system, but to have two Houses. You need an effective government. You don't want a government that lasts only one or two years, right? You want political stability. In RCV, smaller parties have influence because the big parties need to cater to smaller parties a lot more than in FPTP. So even if there is some centrifugal force in the system, even if some extremist parties are being elected, they are getting a platform, they're getting a voice, but they're not getting executive power.

Can you briefly explain your full proposal?

Under my proposal, it will be RCV, not FPTP and will have two Houses. In theory, a Lower House that's elected on RCV, which is not as bad for the small parties and minority and sometimes majority voters as FPTP but not as fragmenting as PR. It's the best of both worlds and an Upper Chamber that's elected through Proportional Representation. That is the combination that I like because the Upper Chamber can still check a PM. You don't want a PM who is too weak and unable to govern, but you also don't want a PM who has no check. The constitution making is a task in optimisation.

What about power-sharing?

Power sharing takes many forms. One form of power sharing is a divided executive, which is a semi-presidential system, where the PM and President both have real executive powers.

How does that work in practice?

It doesn't. It either becomes a system where the PM is a puppet of the President or it becomes a dysfunctional system where they both undermine each other and nothing gets done. Which is why the system I'm suggesting still has a coherent executive led by the PM and where the President remains a nominal head of government of the state.

However, it's a legislature that is divided so Parliament has an Upper House and a Lower House and the Upper House does not elect the PM but moderates him.

How is the Upper House elected?

By PR. For the system to work, the two Houses have to be elected on different electoral methods. Because if you have the same method, you don't need two Houses. Why have two Houses based on the same method?

Should the Upper Chamber also be populated with politicians?

Political experience can be useful but once you become a member of the Upper House, you should not be able to run for the Lower House to guarantee that you're politically independent. I hope that if you do go for a Second Chamber, people who are from outside politics, but who have lived in public life as academics, may also be elected to the Second House. But once you're in the Second House, that should be the final political thing you will do. You become, in some ways, the wise elders who check power and have no more ambition.

And what exactly would be your powers if you are a member of the Upper House?

Your power would be to disagree with the Lower House on bills but you should not be allowed to completely make a government dysfunctional by not allowing it to pass any laws at all.

Wouldn't an Upper House delay bills even more?

You want your laws to take time. Of course, you don't want it to take forever but once enacted, a law can hang around for 50, 100 years. So, yes, parliamentary time is precious but laws are so important that you want them to be debated. As for budgetary bills, I think if the Upper House disagrees, the Lower House should be able to pass them with a slightly higher majority, 55%, 60%, because the Upper House should not be able to deprive the government of funding. Admittedly, in that kind of combination, the Upper House is a slightly weaker player but it has the power to check, to stop, to warn, to make you rethink and to amend and to improve.

How different is this to the Westminster system as we know it?

The first difference is that Westminster in the Commons has FPTP.

Didn't the UK have a referendum on moving to RCV in 2011?

Indeed but the then ruling party, the Conservatives, defeated the referendum with a huge money-fuelled campaign, and today they're getting a voice, but they're not getting executive power.

How? Doesn't FPTP hurts small parties?

It hurts small parties equally. So, very progressive parties and also far-right parties will be hurt equally. But as soon as extremist parties cross the 30% threshold, which is possible, countries also go mad. They don't go so mad that 50% becomes extreme. But the British far-right party has been consistently polling around 30% now for over a year. 30% can happen anywhere but in FPTP that 30% will translate into 50+ seats.

Why?

Because Labour is at 20%. Lib Dems are at 10 to 15%. Conservatives at around 15%. So when the vote against the extremist parties is divided up, then the FPTP basically gives the party with the highest percentage of votes a seat bump and hurts the parties that are below 15 or 20%. So their seats are allocated to the top party, whoever is at the top. RCV does not allow the 70% that's against the extremist party to be split because

extremist or hateful parties are nobody's second choice.

You're not suggesting that the electoral system is the fundamental cause here, are you?

No. Electoral systems are not the fundamental cause. They are the proximate cause. However, what different systems allow is either to stop or help a political force. In Israel, for example, you've seen how one small extreme party that holds the balance of power can trigger a genocide. The AfD (Alternative für Deutschland - AfD) in Germany has been doing really well. It's a matter of time before it moves close to the 30% mark. And then it will become impossible to form a government under PR in Germany without the AfD. In India, PM Modi's BJP won in 2014 with under 32% of the vote. It formed the government, right? This would have been impossible under RCV. Unless the entire country goes mad, which is very difficult.

Tell us a bit more about how this RCV has worked in Australia.

It has worked for over 50 years. Australia is one of the few old and established democracies where the traditional party system has not collapsed and where the centre has not collapsed. There is the One Nation Party, which is the Australian far-right party but it does not get into the Lower Chamber ever because of RCV. It does get a few seats in the Upper Proportional Chamber. I think that's important because if there is an extreme political force in your system, it's important to keep it within the system rather than outside the system. It moderates them as well because they are forced to work with others. So I think giving them a platform to rant, but not executive power, is better than leaving them out completely. If they are completely outside, they will take it to violence. So that combination, I think, works really well in terms of stability in the law.

I can take your example, from what I understand, if I'm an MMM politician in Mauritius today, what would be my calculations? FPTP hurts me very much. Under PR, my party will directly translate votes into seats. But if, as I understand, the MMM is a progressive party, it must worry about not just what PR will do to its own seat share. It must also worry about how PR will encourage an ideology that it hates, which is an extremist far-right ideology. And that is inevitable under PR as sooner or later, somebody will find that this is a low-hanging fruit.

Isn't the Australians RCV complicated? FPTP is a lot simpler and it's quicker. People don't wait for a long time for first count, second count... which would be the case in RCV...

The counting will take a little longer. The voting will not be more complicated. The system I am suggesting has a tweak. It is simpler than the Australian one which requires all the candidates to be counted. I'm suggesting a simpler system where you have a ballot with candidates in one column and three columns with first, second, third and you just put a mark in each column against each candidate.

I understand that after this interview, you're going to talk to the PM. What is the agenda? Electoral Reform or a little chat to a fellow LSE alumna?

I think the agenda for our meeting will be up to the PM to decide. I did meet a steering committee in the Prime Minister's Office yesterday, where I shared my knowledge on constitutional reform processes and possibilities. As a scholar, my job is not to tell you what to do. My job is to tell you what other countries have done, what they have gotten wrong, what they have gotten right. And for us all to learn from other countries and mistakes.

The National Human Rights Commission
3e étage, Ebene Heights, Ebene
Tel: 460-5148
Email: nhrc@nhrc.gov.mu
Fax: 468-6206

l'express

NATIONAL
HUMAN
RIGHTS
COMMISSION

— Dignity for all —