



LAW REFORM COMMISSION

Working Paper

Reform of Local Government Legislative Framework

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About the Commission

The Commission consists of –

- (a) a Chairperson, appointed by the Attorney-General;
- (b) a representative of the Judiciary appointed by the Chief Justice;
- (c) the Solicitor-General or his representative;
- (d) the Director of Public Prosecutions or his representative;
- (e) a barrister, appointed by the Attorney-General after consultation with the Mauritius Bar Council;
- (f) an attorney, appointed by the Attorney-General after consultation with the Mauritius Law Society;
- (f) a notary, appointed by the Attorney-General after consultation with the Chambre des Notaires;
- (g) a full-time member of the Department of Law of the University of Mauritius, appointed by the Attorney-General after consultation with the Vice-Chancellor of the University of Mauritius; and
- (h) two members of the civil society, appointed by the Attorney-General.

The Chief Executive Officer has responsibility for all research to be done by the Commission in the discharge of its functions, for the drafting of all reports to be made by the Commission and, generally, for the day-to-day supervision of the staff and work of the Commission.

The Secretary to the Commission is also responsible, under the supervision of the Chief Executive Officer, for the administration of the Commission.

(I) Background to this Study and Research Methodology

1. In accordance with section 5(a) and (b) of the Law Reform Commission Act, the Commission has, at the request of the Ministry of Local Government, been reviewing the legal framework under which local authorities operate. This Working Paper addresses policy issues critical to the reform process, which would lead to the enactment of a new Local Government Act next year [the new Local Government Bill being introduced in the National Assembly before end June 2009].
2. As announced in the Government Program 2005-2010 and as spelled out in the 2008-09 PBB of the Ministry of Local Government, Government’s objectives are to repeal the Local Government Act 2003 (as well as the Local Government Act of 1989) and enact a new Local Government Act based on democratic principles, which would (a) enable local Authorities to administer their respective council areas and affairs in a more autonomous, transparent, effective and efficient manner in accordance with their mandate; (b) ensure community participation in the management of the affairs of local authorities and engage all stakeholders in local community affairs; and (c) help achieve parity development in both urban and rural areas.
3. The Commission was apprised of (a) Michael Ashley’s 2007 Report on ‘Mauritius: A Review of Local Government Structure, Functions and Legislation’ [Commonwealth Expert appointed by the Commonwealth Local Government Forum (CLGF) and the Government of Mauritius], (b) the 1997 ‘Report of the Commission on Regional Administration’, chaired by Mr. V. Sooben, G.O.S.K., C.M.G, (c) the Strategic Decisions of the Ministry having regard to the reform process (dated May 2008), as well as proposals made by Mr. B. Rajee, on behalf of Chief Executives of municipal/district councils, in his letter dated 03.03.08, and (d) the draft Standing Orders for Municipal/District Councils and the draft Code of Conduct for Councillors.¹

¹ We understand Minister of Local Government, Rodrigues and Outer Islands, Honourable Dr. James Burty David, officially launched on 9 December 2008, the International Anti-Corruption Day, together with the Director-General

4. The Commission has examined the proposals contained in the two reports referred to above and has been reviewing the Local Government Acts of 1989 and 2003 from a historical and comparative perspective, in the light of experience in other jurisdictions [Commonwealth jurisdictions, such as South Africa, India, Australia, Canada, and UK, and other jurisdictions, such as USA and France].

We have paid particular attention to the enabling legal and institutional framework which in UK² and France³ have rendered possible policies geared at local community empowerment and at unlocking the talents of local communities, promoting the economic development and regeneration of localities, promoting integration and social cohesion by addressing the special needs of disadvantaged groups living in deprived areas, through a duty on local authorities to promote civic involvement and for improving engagement with the third sector, to develop a strategy on participatory budgeting, and to develop sustainable communities.

5. With a view to ensuring that the reform of the legislative framework for local government reflects best international practices, the Commission has paid heed to the United Nations Development Fund [UNDP] 2004 Practice Note on ‘Decentralized Governance for Development’ [DGD], its experience in Latin America for ‘Municipal Transparency’ and for a proposed ‘Code of Ethics for Municipal Officers’ [in particular the 2004 exercise in Honduras] and its recent initiatives in Asia about ‘Designing Inclusive and Accountable Local Democratic Institutions’ [February 2008]. The experience of the United Nations

of the Independent Commission against Corruption [ICAC], in the presence of councillors, the ‘Code Conduct for Councillors’.

² Vide, for example, the UK Local Government Association ‘Action Plan for Community Empowerment’ [October 2007], the UK Department for Communities and Local Government Paper on ‘Giving more people a say in local spending - Participatory Budgeting: a National Strategy’ [September 2008], and the UK Department for Communities and Local Government Paper on ‘Principles of Representation: A framework for effective third sector participation in Local Strategic Partnerships’ [August 2008].

³ Vide, for example, the ‘politique de désenclavement des quartiers’ and of the setting-up ‘d’unités territoriales des quartiers’, the 2007 Report of the ‘Observatoire des Zones Urbaines Sensibles’, as well as the Rapport Lambert on ‘Les relations entre l’État et les collectivités locales’ in the context of the ‘révision générale des politiques publiques’ [December 2007].

Capital Development Fund [UNCDF] in least developed countries with ‘Building Local Government Capacity to Achieve the Millennium Development Goals’ has also been considered⁴, as well as the World Bank’s experience in supporting decentralization and local democracy.⁵

The experience of these UN bodies reveal that properly designed decentralization reforms (involving varying degrees of administrative, fiscal and political decentralization) results in improved local governance: (i) more legitimate, transparent, and accountable local authorities and an active and inclusive local political process, (ii) institutional mechanisms for citizens information, consultation and participation in all stages of the local public resources management cycle [such as the adoption of local-level participatory planning and budgeting practice with effective participation of the local communities, through social mobilization taking into account local culture and social fabric], (iii) efficiency gains in local services delivery, and (iv) greater security for citizens. Decentralization and good local governance increase the possibility of people’s participation in the development process but the success of decentralization policies depends mainly upon the existence of an appropriate set of conditions (political, social, cultural, economic and physical) and capacity of institutions both at central and local levels.⁶

6. The principles evolved at the level of the Commonwealth Local Government Forum [CLGF] for the strengthening of effective democratic local government and the establishment of best practices in local government structures and services have also been

⁴ UNDP, along with UNCDF, has generated key lessons from experiences with working at both the upstream and downstream levels, aiming to achieve the desired linkages and synergy between them, in order for DGD to effectively contribute to poverty reduction and other MDGs. These lessons highlight the importance of a holistic approach, more useful engagement of civil society and the private sector while keeping in mind the central role of elected local governments, and effective partnerships.

⁵ Vide ‘Local Dynamics in an era of Globalization’ (2000), ‘The Challenge of Urban Government: Policies and Practices’ (2001), and the Report on ‘Devolution in Pakistan: An Assessment & Recommendations for Action’ (2004) vols. 1-3.

⁶ Devolution seems to increase the risks of local misuse of funds or corruption since more funds and more powers are devolved to the local leadership and local administration.

examined, such as the 2005 Aberdeen Agenda on Good Practice for Local Democracy and Good Governance⁷, the 2006 Kampala Agenda for African Local Government⁸, and the 2007 Auckland Accord on ‘Delivering Development through Local Leadership’⁹, and

⁷ Emphasis is being laid in the Aberdeen Agenda on (a) constitutional and legal recognition for local democracy; (b) the ability to elect local representatives, (c) the need for co-operation and partnerships between spheres of government, (d) local authorities to have appropriate powers in accordance with the principle of subsidiarity (democratic local government being the means by which local communities can shape their livelihoods); (e) the opportunity for citizens to participate in local decision-making, (f) open local government through accountability to the community it serves, through the local decision making process being open and transparent, and through openness to scrutiny (Policy determined by the executive/local authority should be open to scrutiny by other elected members and appropriate civil society organizations/ community individuals. Effective leadership should welcome scrutiny both from within the local council and by the wider community); (g) Inclusiveness: the process of local decision-making must reflect the social, economic, environmental and cultural needs of the entire community; (h) Adequate and equitable resource allocation: in order to respond to the needs of the local community, Local government must have adequate financial resources to fulfill its mandate and ensure significant autonomy in resource allocation, (i) Equitable service delivery: the distribution of services should reflect the diverse needs of the local community, services provided by local government should be accessible to all (The poor and marginalized, may in certain circumstances, require local government to adopt proactive policies to address their particular needs. There is a balance to be struck between nationally set standards and locally set priorities. Local government should have the space to respond to the needs of its local area.); (j) Building strong local democracy and good governance: commitment to continuous capacity development of democratic local government (Effective leadership is central to strong local democracy. It is important to strengthen and build the capacity of councillors, officers, and local governance institutions to ensure that local democracy can enable local government to deliver quality services to the local community. Community leadership is an important and growing role for local government in the creation of sustainable communities. There is also a need to promote civic education and build the capacity of civil society organizations to enable them to engage in and participate effectively in the local democratic process.).

⁸ It was considered that Local government should be empowered and have the capacity to provide minimum social services, have access to resources, and be able to define policies to enable local economic development. The view was taken that actions required to enable local government to operationalise the Aberdeen Agenda include the following: (a) Central government should, in consultation with local government, seek to set minimum standards for realistic service levels for local government, inclusiveness across the whole community in line with accepted Commonwealth targets, to ensure accessibility and participation, and adequate, equitable and objective resource allocation; (b) the role of local government in local economic development and integrated development planning should be strengthened and expanded to ensure that local priorities and service needs are met; (c) Transparency of local government to be enhanced by effective communication with citizens throughout the cycle of accountability that includes planning, consultation, budgeting, implementation, monitoring, evaluation, and reporting, which is central to open local government. (It is recognized that for this to be effective there is a need for capacity building in both local government and civil society.); (d) local governments, in order to be accountable to its electorate, must have the autonomy to set and implement budgets developed in accordance with the legislative framework.

⁹ It was agreed that making local governance more effective requires: (a) Strong accountability in new forms of governance, such as local strategic partnerships, must be complemented by effective accountability of existing local government institutions; (b) Effective local leadership is built upon strong citizen participation and meaningful consultation carried out with a wide range of stakeholders (it is critical that the stakeholders consulted represent a cross-section of society and that special attention be paid on consulting sectors of society that are excluded and hard to reach through traditional methods); (c) Local government must truly represent its communities and needs to address social, economic and political disparities in the community to ensure inclusive democratic processes (The Commonwealth has a target of at least 30 per cent women in public life); (d) Decentralisation demands creation of real, multifunctional government at the local level within the framework of national legislation [Powers to levy local taxes and the obligation of the state to provide local governments with adequate resources are a necessary element of effective decentralization; Decentralisation also allows local government to pass their own budgets, reflecting their

the initiatives taken to meet the challenges thereof [such as the 2005 Research Paper on ‘Municipal Finance: Innovative Resourcing for Municipal Infrastructure and Service Provision’].

7. The principles evolved at the level of the ‘Association Internationale des Maires Francophones’, in particular on the requirements of good governance and the need to ‘donner aux élus les outils leur permettant de définir et de réaliser leur politique municipale en concertation avec la société civile (associations, ONG...)’ during discussions at its Assemblées Générales on topics such as ‘rôle et moyens des villes dans le développement durable et la solidarité’, ‘villes et finances municipales’, ‘Villes et micro finance’, and ‘coopération de proximité et cohésion sociale’, have also been considered.

8. We have also taken note of developments at the level of the Council of Europe with the adoption of the European Charter of Local Self-Government (1985)¹⁰, which embodies

own priorities as well as mandatory expenditure required for the attainment of reliable service delivery and overall community well-being. Without undermining the accountability of elected members, local government itself also has a responsibility to decentralise powers and functions, where practical, to local neighbourhoods so that citizens have a direct stake in local service delivery and are fully involved in the local democratic decision-making process].

Emphasis was laid on the need for local authorities (a) to deliver a strategic vision: Local strategic planning should be closely coordinated with regional and national priorities in the interests of national development. This requires cooperative governance that recognises the distinct roles and responsibilities of different spheres of government – all of which serve the same people. Local leadership must focus attention on key community priorities by setting a strategic direction and representing community priorities to other partners such as central/provincial government and international agencies; Local leadership must galvanise a range of partners in support of community priorities with a view to securing coordinated action and developing more effective new approaches, for example through the concept of ‘inclusive cities’ and civic panels and making more formal provision of the representation of different partners and interest groups on local councils; it must involve citizens in the process of priority identification and delivery, which can be done by such means as consultative implementation and monitoring councils, citizens’ community boards and city community challenges; (b) to ensure service delivery is in support of local development [services are delivered to the local community within a clear performance management framework]; (c) to respond to national and global issues, such as the impact of HIV/AIDS, climate change. These require capacity-building for local leadership, local development partnerships to promote leadership and development, linking with civil society, engaging with the private sector, and enhanced support from international development partners.

¹⁰ European Treaty Series No. 122.

the conviction that the degree of self-government enjoyed by local authorities may be regarded as a touchstone of genuine democracy.¹¹

9. We are of the view that both the provisions of the 1989 and the 2003 Local Government Acts do not sufficiently provide the legal framework for addressing the challenges of globalization. Our Local Government law is certainly in need of reform.

¹¹ The Charter contains substantive provisions setting out the principles of local self-government. It specifies the need for a constitutional and legal foundation for local self-government, defines the concept and establishes principles governing the nature and scope of local authorities' powers. Further articles are concerned with protecting the boundaries of local authorities, ensuring that they have autonomy as regards their administrative structures and access to competent staff and defining conditions for the holding of local elective office. Two major articles aim at limiting administrative supervision of the activities of local authorities and ensuring that they have adequate financial resources at their disposal on terms which do not impair their basic autonomy. The remaining provisions in this part cover the right of local authorities to co-operate and form associations and the protection of local self-government by the right of recourse to a judicial remedy.

There are miscellaneous provisions relating to the scope of the undertakings entered into by the parties. In accordance with the intention of securing a realistic balance between the safeguarding of essential principles and the flexibility necessary to take account of the legal and institutional peculiarities of the various member States, it permits the parties specifically to exclude certain provisions of the Charter from those by which they consider themselves bound. It thus represents a compromise between, on the one hand, acknowledgement of the fact that local self-government affects the structure and organization of the state itself, which is a basic concern of government and, on the other hand, the objective of protecting a minimum of basic principles which any democratic system of local government should respect.

(II) **The Two Pillars on which Reform bringing about Local Community Empowerment should rest: Inclusiveness and Accountability of Local Democratic Institutions**

10. We have formed the opinion that the **Two Pillars** on which **Legislative Reform** aimed at creating an enabling environment for **Local Community Empowerment** should rest are: **Inclusiveness** and **Accountability of Local Democratic Institutions**. Inclusiveness and Accountability are the values underpinning good governance. They would ensure there is a Human Rights-Based Approach to Decentralization¹². Decentralized Governance¹³, carefully planned, effectively implemented and appropriately managed, can lead to significant improvement in the welfare of people at the local level, the cumulative effect of which can lead to enhanced human development. A human rights approach to

¹² A human rights-based approach to decentralization means being guided by the principles, standards, and obligations stemming from the Universal Declaration of Human Rights (UDHR). Conferences in Paris, Vienna, and Tehran have elaborated on the values expressed by the UDHR that support principles of the indivisibility and interdependence of rights, of equality and non-discrimination, self-determination, inclusive participation, subsidiarity, consensual decision-making, transparency with accountability, and the rule of law. A human rights-based approach to decentralization requires that the *design* of the decentralization process, and the practice of its *implementation* shall observe these values and principles, as shall also the structures and processes to be developed as the *form and practice* of decentralized governance.

¹³ Decentralization refers to the *process* of moving towards decentralized governance—in which economic, political and administrative power, authority and resources are transferred from the centre to lower levels of governance -“the processes and institutions through which citizens and groups exercise their legal rights, meet their obligations and mediate their differences”. (UN Consultative Committee on Programme and Operational Questions. *Policy and Programme Matters: Governance*. Draft Matrix Governance. Geneva, 16th Session/2000, p.6.) From a human rights viewpoint, two governing principles of decentralization are: participation and subsidiarity—conferring responsibility for decision and action as close to those affected as possible.

Good or democratic governance is both a means and an end. It is a *means* to achieve the goals of human development, the main elements of which are articulated through the set of Millennium Development Goals [MDGs]. It is an *end* in itself – as values, policies and institutions that are governed by human rights principles, i.e., equality and non-discrimination, participation and inclusiveness, accountability and the rule of law. Decentralizing democratic governance to sub-national levels can accelerate and deepen improvements in access to basic services by the poor and in their capacities to make choices and contribute to decision-making processes directly affecting their lives.

decentralized governance is critical to protecting and promoting the freedom of men and women to lead the kind of lives they choose in dignity, free of injustice and humiliation¹⁴.

11. Inclusiveness entails equal participation; it means that all those who have a stake in the governance process and want to participate in it—men and women, rich and poor, rural and urban—can on an equal basis do so, whether by voting, by contributing to consultations, or by overseeing local public service agencies. Inclusiveness also means that local governments treat everyone equally, that they protect the rights of everyone with equal vigor, that exclusion and discrimination are absent in the provision of public services, and that everyone has equal right to recourse and remedy if there is discrimination by officials [equality of treatment].¹⁵

12. Accountability is based on the idea that people have the right to hold those in power answerable for how they use the authority vested in them and the resources of the people. Accountability needs transparency or full access to information— the people need to know about the functioning of the local authority, to hold it answerable, and the authority needs to provide access to such information. Accountability also needs contestability— being able to choose among alternative political and economic entities on the basis of how well they perform. It also means recourse and remedy whenever actions contravene basic rights, especially those of inclusiveness, or violate the rule of law.

Accountability requires both internal accountability mechanisms and external accountability mechanisms. The first depend on the initiative of local authorities, with impetus and pressure from the people. The second rely on the initiative of the people,

¹⁴ Vide P. Lundberg, ‘Decentralized Governance and a Human Rights-Based Approach to Development’ [UNDP]; L. Joy, ‘Decentralization and Human Rights: A Systemic Approach’ [UNDP] and L. Joy ‘Decentralization and Local Governance Enhancement: A Human Rights Checklist’ [UNDP].

¹⁵ Inclusiveness is enhanced by laws (a) guaranteeing basic rights and freedoms, including the right to participate in the governance process on an equal basis, plus the right to equality before the law, such as the right to be treated equally by government agencies; (b) facilitating broader public consultation; (c) easing the operation of civil society organizations. There is also the need for mechanisms that can ensure those laws are respected and, where necessary and possible, mechanisms that can help redress the consequences of past action.

with acceptance and accommodation by local authorities [such as when the residents in a village select their council representative].¹⁶ Although internal accountability is indispensable, such accountability itself is also considered by many to depend on sound mechanisms of external accountability.¹⁷ Officials are more likely to worry about making internal accountability mechanisms effective when they face the public scrutiny that comes through the external accountability mechanisms.

13. Inclusiveness and accountability of local democratic institutions can be achieved in a number of ways and have to be borne in mind whenever policy choices are being made as to the representational arrangements and electoral systems for the constitution of local authorities (including the issue of adequate representation of women, youth, minorities and other disadvantaged groups), as well as to the organizational structure and administrative context within which local governments operate.¹⁸

14. Sustainable economic growth, equitable distribution of the benefits of such growth and the achievement of Millenium Development Goals [MDGs] require building the capacity of local democratic institutions, with enhanced inclusiveness and accountability, so that

¹⁶ Measures that would strengthen external accountability are (a) greater transparency in the conduct of affairs [through laws that mandate greater public disclosure and access to information]; (b) increased contestability through open, fair, regular elections of public officials; (c) strengthen local governments, which are closer to the people and more able to involve them directly in public decisions and accountability; (d) availability of information on public service performance through surveys, feedback mechanisms, consultations, and similar mechanisms; (e) wider civil-society advocacy and participation, including citizen watchdog groups, especially in the management and oversight of public services that must be tailored to specific communities and groups; (f) better monitoring of the quality of governance and wider dissemination of data that measure that quality in a variety of dimensions, such as discriminatory practices, and control of corruption.

¹⁷ Internal accountability depends on a system of checks and balances and can be improved through administrative reforms, such as (a) decentralizing the functions of government to bring them closer to citizens, who have both a direct stake in performance and the first-hand information to assess performance; (b) strengthening of the performance orientation in public expenditure management, which itself requires actions to improve the flow of information and the quality of debate and dialogue within the administration, thus underlining the importance of an overall governance environment that supports transparency and contestability.

¹⁸ Vide UNDP, ‘Designing Inclusive and Accountable Local Democratic Institutions: A Practitioner’s Guide’ [February 2008].

they can meet the challenges of globalization.¹⁹ Improvements in communication technologies are making it easier for local actors to engage in the development process.²⁰

(III) Functions, Operation and Challenges of Local Authorities/Councils in a Globalized World

15. Local actors are called upon to act as catalysts of a sustainable development and a local authority should, in our view, have the power to do anything which it considers is likely to promote or improve the economic, social and environment well-being of its area.

It is established to provide for the government and management of its area at the local level and, in particular—

- (a) to act as a representative, informed and responsible decision-maker in the interests of its community;
- (b) to provide and co-ordinate various public services and facilities and to develop its community and resources in a socially just and ecologically sustainable manner;
- (c) to encourage and develop initiatives within its community for improving the quality of life of the community;
- (d) to represent the interests of its community to the wider community;

¹⁹ Vide World Bank Institute, ‘Local Dynamics in an era of Globalization: 21st century Catalysts for Development’ (2001) and United Nations Capital Development Fund [UNCDF], ‘Delivering the Goods: Building Local Government Capacity to achieve the Millenium Development Goals – A Practitioner’s Guide from UNCDF Experience in Least Developed Countries’ (2005).

²⁰ As to an analysis of digital inclusion strategies, vide UK Department of Communities and Local Government Research Paper as well as UK’s Action Plan for Consultation [October 2008].

- (e) to perform and discharge the powers, functions and duties of local government as provided by law in relation to the area for which it is constituted.

16. The functions of a council would include—

- (a) to plan at the local level for the development and future requirements of its area: every local authority must prepare a community strategy for promoting or improving the economic, social and environmental well-being of its area contributing to the achievement of sustainable development and, in preparing or modifying its community strategy, a local authority must consult all stakeholders (NGOs and other local communities, businesses, and the members of the community);
- (b) to provide services and facilities that benefit its area, its ratepayers and residents, and visitors to its area;
- (c) to provide for the welfare, well-being and interests of individuals and groups within its community;
- (d) to take measures to protect its area from natural and other hazards and to mitigate the effects of such hazards;
- (e) to manage, develop, protect, restore, enhance and conserve the environment in an ecologically sustainable manner, and to improve amenity;
- (f) to provide infrastructure for its community and for development within its area (including infrastructure that helps to protect any part of the local or broader community from any hazard or other event, or that assists in the management of any area);

- (g) to promote its area and to provide an attractive climate and locations for the development of business, commerce, industry and tourism;
- (h) to establish or support organisations or programs that benefit people in its area or local government generally;
- (i) to manage and, if appropriate, develop, public areas vested in, or occupied by, the council;
- (j) to manage, improve and develop resources available to the council;
- (k) to undertake other functions and activities conferred by law.

17. A council would have, in the performance of its roles and functions, to—

- (a) provide open, responsive and accountable government;
- (b) be responsive to the needs, interests and aspirations of individuals and groups within its community;
- (c) participate with other councils, and with Central Government, in setting public policy and achieving local and national objectives;
- (d) give due weight, in all its plans, policies and activities, to local and national objectives and strategies concerning the economic, social, physical and environmental development and management of the community;
- (e) seek to co-ordinate with other councils, statutory bodies and Central government in the planning and delivery of services in which those other persons have an interest;

- (f) seek to facilitate sustainable development and the protection of the environment and to ensure a proper balance within its community between economic, social, environmental and cultural considerations;
- (g) manage its operations and affairs in a manner that emphasises the importance of service to the community;
- (h) seek to ensure that council resources are used fairly, effectively and efficiently;
- (i) seek to provide services, facilities and programs that are adequate and appropriate and seek to ensure equitable access to its services, facilities and programs.

(IV) Specific Legal Issues calling for Policy decisions

18. Specific issues calling for strategic policy-making decisions are:

- (a) Local Government Structure: which system of Localities to devise;
- (b) Constitution of Local Councils: which type of Electoral System would enable Wide Representation and Strengthen Local Democracy [including the issue of representation of Women, Youth, Minorities and the Most Disadvantaged] and allow Local Leadership deliver Development;
- (c) Local Self-Government and Decentralization: what types of Services Local Councils could provide to the local community for its well-being;

- (d) Meetings and Procedure of Local Councils and Duties of Councillors: which arrangements would help Councillors perform their duties in a more transparent and effective manner [including Standards of Conduct for Councillors];

- (e) What type of Accountability through Central Government Oversight;

- (f) What legal framework would be conducive to the Delivery of Services through an Efficient, Effective and Responsive Administration & which Mechanisms for the Accountability of Local Government Officers;

- (g) What Mechanism for Active Citizenship & Local Community Consultation in the Conduct of Local Affairs;

- (h) What Mechanisms for Local Partnership Strategies;

- (i) Local Government Finance: How to ensure Fair Allocation of Resources and provide opportunity for Innovative Resourcing for Local Council Infrastructure and Service Provision;

- (j) What mechanisms would ensure Local Community Empowerment through Sound Performance-Based Financial Management?

(A) Local Government Structure: Local Councils based on the System of Localities

19. We assume that the division of the island into towns, districts and villages may still reflect the reality of our localities today. The important point for us is that there should be an objective way of delimiting localities, which take into account their geographical features, such as natural boundaries, their historical development, as well as the existence within any given area of a community of interests.

20. The issue of whether or not village councils should be retained or abolished has been discussed by Sooben and Ashley. We are of the opinion that village councils should be retained as they provide the inhabitants of these localities a strong sense of local identity and community. Village councils enhance our local democratic governance. We believe that village councils may, with appropriate capacity building, deliver effectively local development programs.

(B) Constitution of Local Councils: an Electoral System that enables Wide Representation and Strengthens Local Democracy, and allows Delivery of Development through Local Leadership

21. Representational arrangements vary from one jurisdiction to another, with a combination of direct and indirect elections to councils, and at times appointments being made of non-elected members in local government.²¹

²¹ Vide UNDP, ‘Designing Inclusive and Accountable Local Democratic Institutions: A Practitioner’s Guide’ [February 2008] at pp. 8 seq.

22. We consider councillors should be directly elected to a council. To that end, we recommend that due consideration be given to the election of district councillors from wards in the district council area, as is the case for municipal councils of towns. The division of the island into wards must be looked into afresh, as well as the number of councillors per ward.

23. While ward-based electoral systems can be beneficial in terms of ensuring accountability and being relatively simple, they can also be problematic when minorities or politically weak groups within ward are not fully represented. The first-past-the-post-system [FPTP] may not ensure a fair representation of all interests within the local communities. Consideration would have thus to be given as to whether some form of proportional representation [PR] would have to be introduced in the electoral system [so that in addition to the councillors returned per ward, a number of councillors would be elected on the basis of their representation in the municipal or district council area].

PR systems offer the chance of greater plurality in representation, by assigning council seats to parties on the basis of the proportion of the vote they obtain. In many respects, PR systems seem intrinsically more “democratic.” They are also better able to handle the issue of minority and politically weaker groups than are FPTP systems; women and other disadvantaged groups can, however modestly, usually ensure some representation through PR. Not surprisingly, then, PR systems tend toward few or weak affirmative action provisions intended to safeguard the interests of such groups.²² PR systems, significantly, lead to many fewer wasted votes. Beyond a certain threshold, all parties that contest an election will end up being represented on local councils. This – in theory – means that almost every vote really does “count” and thus increases the likelihood of popular participation and confidence in the local electoral process.²³

²² Such as Indonesia, Cambodia and Sri Lanka: vide UNDP, ‘Designing Inclusive and Accountable Local Democratic Institutions: A Practitioner’s Guide’ [February 2008] at pp. 85-86, 94-96, and 126-128.

²³ Ibid., at p. 25.

24. The first-past-the-post system appears appropriate for elections to village councils, so long as its population does not exceed a certain number; beyond a certain threshold, it may not secure as wide a representation of the interests of all the electors in the village as is desirable for effective local representation.
25. Currently Mayors as well as Chairpersons of District Councils are elected indirectly. A range of issues can be linked to the ways in which council leaders are elected:
- (a) A system whereby council chairpersons are indirectly elected by their councils does, in principle, offer the singular advantage of a more collegial and consensual form of local governance. Under such systems, mayors/chairpersons need to ensure regular support from their councils – and this may imply a tendency toward broad-based decision-making. Where councillors represent wards, this in turn implies that decision making may be more likely to take into account the interests of many constituents.
 - (b) However, indirectly elected mayors or council chairpersons – unless they can ensure the allegiance of their councils and councillors – may become “lame ducks” as they fall victim to party politics or to internal disputes within their councils.
 - (c) Increasingly, indirect elections for council leaders are seen as problematic in terms of accountability. Indirectly elected council chairpersons may see themselves as more accountable to their immediate constituency (i.e., the individual electoral college that has selected them) than to local citizens.²⁴
26. To an increasing extent, direct elections of council leaders are seen as more appropriate than indirect elections. A number of advantages are cited in favour of direct elections for mayors or council leaders²⁵, inter alia:

²⁴ Ibid. at p. 18.

²⁵ See e.g. *Human Development Viewpoint: Presidentialism in Decentralized Governance: More Local Leadership, But at What Cost?* (Larsen and Maguire 2005).

- (a) Greater legitimacy for Local Government as a whole: A mayor who is directly elected is more clearly the preferred individual choice of local citizens than one indirectly elected by a limited number of councillors. S/he more manifestly expresses local preferences, which in turn contributes to strengthening and legitimating local democratic practice;
- (b) Clearer separation of powers and functions between the executive and legislative branches at local level. This enables mayors or leaders to operate more independently of partisan interests of their councils and enables the latter to more clearly and unequivocally provide oversight of the directly elected mayor or council leader;
- (c) Greater accountability, in the sense that a directly elected council chairperson or mayor is more clearly seen as individually responsible for delivering public goods and services and honouring electoral commitments;
- (d) More effective Local Governance, in that directly elected mayors can “get on with their jobs” more effectively than indirectly elected leaders: A “good” directly elected mayor is likely to be more effective than a “good” indirectly elected mayor, all other things being equal.²⁶

27. We reckon, however, that direct election of council chairpersons or mayors may also have its down side:

- (a) Excessive power being wielded by the directly elected mayor, in that directly elected leaders may see themselves (and be seen) as much more than a *primus inter pares*. Council chairpersons who are directly elected may overshadow fellow Council

<http://regionalcentrebangkok.undp.or.th/practices/governance/decentralization/Representation.html>
Council of Europe *Recommendation 151 (2004) on advantages and disadvantages of directly elected local executive in the light of the principles of the European Charter of Local Self-Government*
(http://www.coe.int/T/E/C/rae/_5._Texts/2._Adopted_texts/1._Recommendations_2004/REC_151_2004_E.asp#TopOfPage) and Chapter 4 of *To Serve and Preserve: Improving Public Administration in a Competitive World* (ADB).

²⁶ Op. cit, note 19, at p. 19.

members by virtue of their much stronger electoral mandate and may thus stifle democratic debate in Council. This is one of the initial lessons from Thailand and Pakistan (which shifted to direct election in 2004 and 2005 respectively) and from Bangladesh, where directly elected Union Parishad chairpersons exert a powerful influence over local affairs, leading to apathy amongst other members;

(b) The risk of political stalemate: When a directly elected mayor and the council fall out politically, the resulting stalemate can have debilitating consequences for decision making and, thus, local service delivery.²⁷

28. There is a need to have at local level a strong leadership capable of delivering local development programs. This does not mean, however, that this objective is only achieved by a system of direct election of a Mayor or Chairperson by the electors of the municipal or district council area.²⁸ May be having a longer mandate than the current one of one year may help achieve this objective.

²⁷ Loc. Cit.

²⁸ As is the case under the UK Local Government Act 2000.

(C) The Issue of Representation of Women, Youth, Minorities and the Most Disadvantaged

29. It is a fundamental democratic principle that all social groups should be fairly and adequately represented. This is generally achieved by putting in place electoral and political party systems that ensure better representation [for example by requiring political parties to field a number of women candidates for elections] or through the introduction of quota systems and reserved seats.²⁹
30. Several countries have used reserved seats as the basis for quotas in Local Government elections. India is one where far-reaching provisions for affirmative action have been made and are enshrined in the Constitution. Seats in Local Government bodies at all levels are reserved for Scheduled Castes and Tribes according to their proportion of the population, and at least one-third of seats are reserved for women. Similar quotas apply to local council leadership positions.
31. Mr. Ashley recommends in his Report there should be a system of quota for women representation at local council elections. We do not believe that fair representation should be achieved through a system of quota for any group. We consider what is needed are policies which motivate all segments of the population and generate in them interest for the process.

²⁹ Op. cit., note 19, at pp. 38 seq.

(D) Local Self-Government and Decentralization: Functions/Services of Local Councils

32. As we have pointed out earlier, a local council should have the power to do anything which it considers is likely to promote or improve the economic, social and environment well-being of its area.
33. We do not consider that in law a village council should have a narrower mandate than a district or municipal council, though we appreciate that in practice it may turn out that its primary functions are representative, deliberative and consultative rather being concerned with service delivery.

(E) Meetings and Procedure of Local Councils and Duties of Councillors

34. In most countries, council members tend to be elected and seen as voluntary representatives of the public. As such, they are usually not paid regular salaries. Nonetheless, being a council member is not without its costs: Council members must dedicate time, travel to meetings, arrange meetings with their constituents and the like. The payment of sitting fees and the like has implications for representation. Where no remuneration is provided, poorer citizens may either be deterred from standing for election (in the knowledge that they will be ill-placed to participate in council deliberations) or, in the event that they are elected, may find it difficult to afford the costs of being a representative. Wealthier citizens do not face the same constraints under such circumstances. We therefore welcome the recent change brought about in the law by the Local Government Act No. 20 of 2008, which amends sections 14 and 19 of the Local Government Act of 1989 and provides that henceforth a mayor, a deputy mayor and every municipal councillor, a chairman, a deputy chairman and every district councillor shall be paid such monthly remuneration as may be prescribed.

35. Currently, public officers and local government officers are disqualified to be elected as councillor. We consider this restriction may be disproportionate to the aim of ensuring a politically neutral public service.
36. Should a Mayor or Chairperson of a District be elected directly by the electorate, it would make sense for him to have a cabinet, whose functions would have to be clearly delineated. We consider the Committee system might not then be retained.
37. It must be laid down by statute, as is the case under section 62 of the South Australia Local Government Act 1999, the duties of a councillor:
- (a) a councillor must at all times act honestly in the performance and discharge of his/her official functions and duties, must at all times act with reasonable care and diligence in the performance and discharge of official functions and duties;
 - (b) a member or former member of a council must not make improper use of information acquired by virtue of his or her position as a member of the council to gain, directly or indirectly, an advantage for himself or herself or for another person or to cause detriment to the council;
 - (c) a member of a council must not make improper use of his or her position as a member of the council to gain, directly or indirectly, an advantage for himself or herself or for another person or to cause detriment to the council.
- Breach of any of these duties is a criminal offence.
38. The Minister of Local Government must be conferred the power, as is the case in UK, of laying down a model code of conduct for councillors, which he shall cause to be

published in the Government Gazette.³⁰ There must also be a register of disclosure of interests by councillors.

39. We do not consider that actions against a local authority should be brought within a shorter period and that there should be a notice prior to the action, suit or proceeding, as is laid down in section 43 of the Local Government Act 1989. In our view such a provision is inimical to our democratic state constitutionally based on the rule of law.³¹

(F) Accountability through Central Government Oversight

40. While local councils enjoy varying degrees of autonomy, they are generally subject to some kind of upward accountability to Central Government. The degree to which local councils are subject to supervision is important in two fundamental respects. First, too much external control or supervision effectively disenfranchises locally elected bodies, turning their “representative” role into one that can be denuded of accountability – simply because they have little authority to make binding decisions. Second, too little external control/supervision means that locally elected bodies are not held upwardly accountable for a range of public sector responsibilities (such as service delivery standards or the management of financial resources transferred from Central Government). There is a need to find the right balance.

41. Traditional forms of control are based on institutional oversight mechanisms emphasizing the legality, regularity and appropriateness of local actions. In our view, these should

³⁰ UK Local Government Act 2000, section 50.

³¹ Vide Report of the Commission on ‘Access to Justice and Limitation of Actions against Public officers and the State’ [May 2008].

today have to be: (i) “performance-based”, and (ii) “administration or rule-based”³² and would take the form of ‘guidance’ issued by the Minister to local authorities.³³

(G) Delivery of Services through an Efficient, Effective and Responsive Administration & Accountability of Local Government Officers

42. Local councils need to have some kind of “dedicated” local administration to manage the day-to-day affairs of their jurisdictions. Under our current system, the local authority is the employer, but appointment of local government officers, removal from office, and disciplinary control over local government officers is exercised by the Local Government Service Commission [LGSC], which is established by an Act of Parliament. The legal framework ensures local government service, as much as the public service, is politically neutral and that there is no room for political patronage (as was the case until the early 1980s): the career of an officer is determined by his merit. Indeed, section 52 of the Local Government Act 2003 ensures that conditions of service applicable to the public service shall apply to the local government service and that posts are established according to administrative convenience, and not owing to political considerations. But how far local councils are effectively the employers of locally posted staff is an important determinant of their ability to shape service delivery – and thus, of their ability to translate popular representation into accountable Local Government.

43. We consider the Minister of Local Government should, as is the case in UK, be given the power to issue a Code of Conduct for local government officers, which he shall cause to

³² Vide D.R. Mullin, ‘Accountability and Coordination in a Decentralized Context: Institutional, Fiscal and Governance Issues’ [American University, Washington, D.C., 2004].

³³ Vide section 38 UK Local Government Act 2000.

be published in the Government Gazette.³⁴ We are also of the opinion that a local government officer must, as is the case in South Australia, be subjected to a statutory duty to act, at all times, honestly, and with reasonable care and diligence, in the performance of official duties.³⁵

(H) Mechanism for Active Citizenship & Local Community Consultation in the Conduct of Local Affairs

44. It is acknowledged there is a need for 'participatory democracy and responsive local government': the two are mutually reinforcing and supportive - strong, aware, responsible, active and engaged citizens along with strong, caring, inclusive, listening, open and responsive local democratic governments'.³⁶ Decentralized governance is effectively strengthened and rendered more accountable when participation is encouraged, facilitated and institutionalized. Communities, neighbourhoods and individuals can play a crucial role in ensuring that local government responds to their needs by participating in the planning, implementation and monitoring of activities and projects affecting their lives and eventually impacting the level of human development they maintain³⁷.

45. In France the ‘Code des Collectivités Territoriales’ provides for the ‘participation des électeurs aux décisions locales’ by a ‘référendum local’ or through ‘consultation des électeurs sur les décisions que les autorités de cette collectivité envisagent de prendre

³⁴ Section 82 of UK Local Government Act 2000.

³⁵ Section 109 South Australia Local Government Act 1999.

³⁶ Vide J. Gaventa, ‘Towards Participatory Local Governance: Assessing the Transformative Possibilities’ [Institute of Development Studies, 2003].

³⁷ Vide R. Work, ‘The Role of Participation and Partnership in Decentralized Governance: A Brief Synthesis of Policy Lessons and Recommendations of Nine Country Case Studies on Service Delivery for the Poor’ [UNDP].

pour régler les affaires relevant de la compétence de celle-ci.’³⁸In UK provision is also made in the local government law for a referendum to be organized by a local council following petition from local electors, or upon direction or order from the Secretary of State.³⁹ In South Australia, a local council may convene a meeting of electors of the area or part of the area⁴⁰; it must also prepare and adopt a public consultation policy.⁴¹ We consider some thought must be given as to the desirability of introducing such concepts in our law.

(I) Mechanisms for Local Partnership Strategies

46. To establish the conditions for sustainable development, action initiated at the local level is vital.⁴² Forging equitable and mutually beneficial partnerships at the local level can strengthen decentralized governance and can increase the potential resources available to local government and that can be put at the service of human development.

47. Partnership in governance is usually seen as a matter of government working with stakeholders in a particular sector, such as health, or from the private sector and civil society. Sometimes the media and learning institutions are seen as separate from civil society and treated as partners by themselves. Partnership can be a one-off affair confined

³⁸ Vide ‘Chapitre II du Livre 1^{er}’.

³⁹ Sections 34-36 UK Local Government Act 2000.

⁴⁰ Section 93 South Australia Local Government Act 1999.

⁴¹ Section 50 of the Act: Interested persons must be provided with a reasonable opportunity to make submissions in the relevant circumstances.

⁴² Mr. Jonas Rabinovitch, Senior Urban Development Advisor, UNDP, at the 101st Conference of the Inter-Parliamentary Union, held in April 1999 in Brussels, Belgium, considered that “Globalization trends are emphasizing in an unprecedented way the importance of local and metropolitan levels of democracy and management. While acting globally, the world community acknowledges the importance of local actions”.

to a specific issue or situation. Or it can be a regular practice. It can also be a matter of policy to foster partnerships with all stakeholders across the board in all matters in all sectors. This is most likely to happen where public trust is strong, where a culture of co-operation rather than competition and confrontation has been nurtured and where partnership mechanisms have been institutionalized.⁴³ We consider every local council should be under an obligation to develop long-term partnerships with other local stakeholders.

(J) Local Government Finance: Fair Allocation of Resources and Scope for Innovative Resourcing for Local Council Infrastructure and Service Provision

48. The legal authority to perform certain functions is meaningless if local authorities are deprived of the financial resources to carry them out. Local authorities should thus be entitled, within national economic policy, to adequate financial resources of their own, of which they may dispose freely within the framework of their powers.

49. Part at least of the financial resources of local authorities would derive from local taxes and charges of which, within the limits of statute, they have the power to determine the rate. We are of the opinion that recourse to user charges as a source of additional local revenue needs to be explored, as is the case under section 113 of the Local Government Act 2003.⁴⁴

50. We consider the protection of financially weaker local authorities calls for the institution of financial equalization procedures or equivalent measures which are designed to correct the effects of the unequal distribution of potential sources of finance and of the financial burden they must support. Such procedures or measures should not diminish the discretion local authorities may exercise within their own sphere of responsibility. We are also of the

⁴³ Op. cit., note 37, at p. 26.

⁴⁴ Vide R.M. Bird, ‘User Charges in Local Government Finance’, in M. Freire & R. Stren (eds.), *The Challenge of Urban Government: Policies and Practices* (World Bank Institute, 2001).

view that for the purpose of borrowing for capital investment, local authorities should have access to the national capital market within the limits of the law.

(K) Strategies for Local Community Empowerment and Delivery of Local Development Programs through Sound Performance-Based Financial Management

51. Experience elsewhere shows that performance-based budgeting has had extremely positive results.⁴⁵ We therefore recommend its application to Local Government, as is the case for Central Government, but hasten to add that the effectiveness of performance-related mechanisms is dependent on several factors related to context, such as the degree of corporate or downward accountability of local governments to citizens, clarity of service provision responsibilities, level of financial autonomy enjoyed by local government, and degree of local government control over staff.⁴⁶

52. There is the need for efficient and effective management of funds: budget approval and release of funding⁴⁷, as well as control and auditing of local government use of funds.

⁴⁵ Vide United Nations Capital Development Fund [UNCDF], ‘Delivering the Goods: Building Local Government Capacity to achieve the Millennium Development Goals – A Practitioner’s Guide from UNCDF Experience in Least Developed Countries’ (2005) at pp. 66 seq.

⁴⁶ Ibid. at pp. 75 seq.

⁴⁷ A Local Authorities Financial Management Manual, which would provide the proper framework for all local authorities for efficient financial management, should be issued. The manual should define the roles and responsibilities of the local authorities and their officers in matters of finance and enunciate the basic principles that should apply to all local authorities for inter alia the collection of revenue, the incurring of expenditure and the management of cash flow. It should also outline the requirements for internal control and the modern concepts of internal auditing.

(V) Next Steps in the Legislative & Policy Reform Process

53. This Paper makes no pretence at being exhaustive. It identifies the principles which underlie the reform process and matters to be addressed. Many of the issues we have highlighted give rise to considerations, which are shaped primarily by political judgments. It is up to the policy makers to make their informed choices, whilst paying heed to the capacity-building implications thereof.