AN ASSESSMENT OF CORPORATE GOVERNANCE IN THE MAURITIAN PUBLIC SECTOR - THE ACCOUNTABILITY OF THE BOARDS OF THE STATUTORY BODIES

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ABSTRACT

The purpose of this paper is to assess the status of corporate governance in the public sector of Mauritius with more focused attention on accountability of the boards of Mauritian statutory bodies.

The paper goes through a review of the evolution and status of governance internationally and nationally. Legal analysis of statutory provisions pertaining to governance in Mauritius was also done. For a better understanding of this analysis a comparative approach was taken by comparing statutes of three statutory bodies. The assessment is however limited to legal provisions in Mauritius. Due to limited resources, the evolution of the practice of governance was not assessed.

The paper found that statutory boards in Mauritius appeared accountable to the parent Minister. The wide powers of intervention of the Minister contradicted the corporate governance provisions which provided for the board of such enterprises to be operationally autonomous**.**

An agreement between the parent Ministry and directors at the time of their appointment, making use of external recruitment consultants and adopting proper disclosure of appointment procedures would professionalise board nomination procedures and bring greater operational independence of statutory boards while maintaining accountability. The legal framework of statutory bodies may also need to be reworked if greater operational independence of the boards is desirable.

INTRODUCTION

Governance has become a catchword for all that is required for the proper management of the affairs of a country, of a business or even of small non-profit institutions set up in communal groups. The generally accepted components of governance, the principles of accountability, transparency, participation and inclusion, are almost universal features of policies at national and international levels. The four components boil down to one when we consider that participation through a framework that ensures accountability leads to greater inclusion of stakeholders with the end in view being greater transparency. Thus an accountability framework emerges as the principle ingredient for good governance.

An understanding of corporate governance in the public sector of Mauritius would be more easily grasped through an assessment of how accountability, as an element of good governance, finds its place in the system considered. The boards of statutory bodies are targeted to narrow down the assessment base. To provide a correct assessment of corporate governance in the Mauritian public sector, it appears needful to follow a systematic analysis by firstly, understanding what corporate governance is and how it becomes applicable in the public sector, secondly, what constitutes accountability in the public sector, and finally the place of accountability in relation to the statutory bodies in Mauritius.

CORPORATE GOVERNANCE IN THE PUBLIC SECTOR

Governance

Governance relates to the function of governing. At the level of the State, one could say that it is the aim, action and powers of the three arms of government under the tripartite system of separation of political powers, namely legislative, executive and judiciary. At the level of private institutions, including companies, it would be the system by which such institutions are directed and controlled.

The Organisation for Economic Co-operation and Development ('OECD') defines corporate governance as involving relationships between management, the Board, the shareholders and other stakeholders of a company. Corporate governance would plausibly refer to corporates and prompts towards an exclusive relationship to the private sector. Is there no need for

corporate governance in the public sector? As a response, the OECD issued Guidelines on Corporate Governance of State-Owned Enterprises in 2005. This has recently been updated in 2015.

The National Code of Corporate Governance for Mauritius ('NCCG') 2016 defines corporate governance as "what the Board of an organisation does and how it sets the values of the organisation", as distinguished from operational management, with the aim of facilitating "effective, entrepreneurial and prudent management" to deliver long-term success. It is also therein provided that the NCCG is applicable to certain public sector organisations thus establishing that corporate governance has its place in the Mauritian public sector.

THE PUBLIC SECTOR

The dictionary definition of the public sector is that section of the economy controlled or owned by the government[1]. It is broadly understood to include organisations and people employed for a public purpose and supporting the government of the day.

The Global Institute of Internal Auditors provides that the public sector includes an expanding ring of organisations with the core government at the centre closely followed by agencies and public enterprises. The core government would include all departments, ministries with limited territorial authority and accountable to the Parliament, cabinet, legislature, or executive head. Agencies deliver public goods or services operating with a partial operational independence and are headed by a board or a commission. They often exist as a separate legal entity. Public enterprises also deliver public goods and services but they have their own source of revenue, although sometimes they benefit from public funding. They are operationally independent and sometimes compete against private firms[2].

PUBLIC SECTOR IN MAURITIUS

In Mauritius, the Human Resource Development Council ('HRDC') in 2009, defined the public sector as that "part of economic and administrative life that deals with the delivery of goods

[1] https://www.merriam-webster.com/dictionary/public%20sector, last viewed on 25 April 2017.
[2] Supplemental Guidance: Public Sector Definition, Dec 2011, The Institute of Internal Auditors Global (https://na.theiia.org/standards-guidance/Public%20Documents/Public%20Sector%20Definition.pdf, last viewed on 22 October 2018

and services by and for the Government, whether national, regional or local/municipal"[3]. The HRDC is a statutory body set up in 2003 to provide necessary guidance for human resource development in Mauritius, more specifically in the public sector.

From this definition, HRDC also derived certain principles to be applied in the public sector which was traditionally associated with civil service systems which were based on rules and procedures. In relation to its stakeholders, it rose as an "impartial but obedient instrument of the State[4]" and as a "detached, impartial interpreter and implementer of the laws and the policies of the day[5]" striving to protect public interest. As such the key principles of stability and continuity were underpinned.

The National Committee on Corporate Governance, in December 2006, issued Guidance Notes for State-Owned Enterprises which provided the following definitions:

- State-owned enterprises are "social institutions" accountable to the community in general where the State is the "owner" and the population is the "stakeholder";
- State-owned enterprises must comply with the Code or explain their reasons for non-compliance, except where the respective Acts establishing these organisations provide otherwise;
- The term "parastatal bodies" includes corporations set by Acts of Parliament and corporations where Government is the majority shareholder.

The more recent NCCG 2016 does provide guidance notes for statutory bodies. However the definition of the earlier guidance notes would appear to prevail as no fresh definition is provided for state-owned enterprises. Moreover the NCCG 2016 is said to be specifically applicable to public interest entities as defined by the Financial Reporting Act 2004 and public sector organisations listed as public interest entities in Schedule 1 of the Financial Reporting Act 2004. These are financial institutions regulated by the Bank of Mauritius, except for cash dealers, and the Financial Services Commission, listed companies and companies having during 2 consecutive years at least two of either an annual revenue higher than 200

[3] Review of National Human Resource Development Plan, Human Resource Development Council, 2009, http://www.hrdc.mu/index.php/downloads/category/13-nhrdp-2-2009, last viewed on 10 May 2017, Chapter 11.

[4] Ibid.
[5] Ibid.

million rupees, total assets more than 500 million rupees or more than 50 employees. These definitions appear to place public sector and private sector entities at par. Accordingly corporate governance does apply to the public sector, which in Mauritius as supposedly elsewhere, includes state-owned enterprises and parastatal bodies set up as statutory corporations.

APPLICABLE PRINCIPLES UNDER CODES/GUIDANCE NOTES

International

Governance principles for the public sector appear to have been initiated from the Nolan Committee of Standards of Public Life set up in 1995 to address unethical conducts of politicians. The Nolan principles of good governance in the public sector comprise selflessness, integrity, objectivity, accountability, honesty, openness and leadership. There have since been other endeavours to develop governance principles for the public sector with, inter-alia, Australia's Good Governance Guide for public sector agencies last updated in 2013 and the International Framework: Good Governance in the Public Sector developed jointly by the Chartered Institute of Public Finance and Accountancy (CIPFA) and the International Federation of Accountants (IFAC) in 2014.

Internationally it has been recognized that accountability is critical for achieving development objectives. The Paris Declaration on Aid Effectiveness and the Accra Agenda for Action 2005 recognised as early as in its Statement of Resolve that the Millennium Development Goals could be achieved only if countries put in effort to strengthen governance which is defined to most prominently include "the capacity to … account for results of policies and programmes"[6].

National context

In Mauritius, corporate governance was introduced as a concept in 2001 with the setting up of a National Committee on Corporate Governance. This was followed by the publication of the Report on Corporate Governance for Mauritius in October 2003. This report included the first

[6] The Paris Declaration on Aid Effectiveness (2005) and the Accra Agenda for Action (2008), http://www.oecd.org/dac/effectiveness/34428351.pdf, last viewed on 14 November 2017.

Code on Corporate Governance for Mauritius. Even at this initial stage the Code proposed to adopt an inclusive approach to governance and aimed to achieve triple bottom line reporting by embracing the economic, social and environmental aspects of a company's activities.

The earlier code declared abiding by the five principles of the Organisation for Economic Co-operation and Development ("OECD") including, the rights of shareholders, the equitable treatment of shareholders, the role of stakeholders in corporate governance, disclosure and transparency, responsibilities of the board. Rather than principles, which by definition would point towards concepts or foundations for proposed behaviour, these appear more as non-mandatory rules or guides, broken down into provisions, on the roles of each party in a governance framework. The NCCG 2016 again takes up a similar approach, except that here the rules are more mandatory. There is a lot of emphasis on the correct procedure to be followed. The Mauritian codes are therefore very much procedure-centred.

Moreover, the very concept of 'apply/comply or explain', which since a few years is of international renown in relation to the application of corporate governance principles, underlines the application of procedures. Procedures are different from principles in the sense that, in corporate governance, for example, application of the former demonstrates that the latter are being adhered to. When you have stakeholders, your ethical behaviour should be demonstrated to ensure sustainable business. The procedures are there to demonstrate that the business adheres to principles. Being ethical is not sufficient and a given institution, with the NCCG 2016, can no longer choose the procedures it will follow to demonstrate ethic.

The governance procedures, as enunciated in the NCCG 2016, are mandatory to public interest entities. That is probably the reason why the NCCG 2016 introduces a new concept, the 'apply and explain' methodology. Public interest entities do not need to bother about what are the principles and how to apply them. Application of the NCCG 2016 and explanation of such application in their annual reports are mandatory to them[7] and templates are already provided.

Such a mandatory application of governance procedures may not be a bad thing. Ms. A. I. Anand is of the view that where investor protection is the main objective, the state may achieve its objective through mandatory provisions[8]. This suggests that there may be economic reasons

[7] The National Code of Corporate Governance for Mauritius 2016, page 7 (Governance and the Code), page 11 (Code Application and Implementation).
[8] Anita Indira Anand (2005), An Analysis Of Enabling Vs. Mandatory Corporate Governance Structures Post

for the introduction of a procedure-centered mandatory code in Mauritius. In any case, while playing by the rules, may, on the one hand, encourage an intellectual lethargy in the development of an understanding of ethical or governance principles, on the other hand, it also requires all members of the community to exhibit minimum standards of practice. Following pre-determined rules would no doubt help a better harvest in terms of accountability by decreasing the cost to investors, and any other stakeholders, to be informed. There being uniform rules to be followed, it is easier for interested parties to compare institutions. The mandatory rules may just be the appropriate means to achieve accountability as a desired end. Indeed the NCCG 2016 requires that all organisations should have a written description of major accountabilities within.

However accountability and responsibility as a principle are present in the public sector in various forms. Indeed there are schemes of service documents for every public posts which define the duties, responsibilities and accountabilities of public servants. This has been the case since the start of the civil service in Mauritius. However there have been some changes in the management of the public sector with the emergence of the new concepts of governance. Since the emergence of the civil service system with industrialization, the HRDC finds that Mauritius has undergone a paradigm shift to a modern public management model which focuses on the hands-on skills of managers and non-adherence to the traditional doctrines or practices. More recently, the public sector strives to adhere to a more stakeholder inclusive model aiming to create value, the responsive governance model. The aim is to manage multiple stakeholders and conflicting values and achieve "a constructive interaction between the State, the private sector and civil society". Nourishing the paradigm shift in public management, the key principles to this model are openness, transparency and accountability[9].

ACCOUNTABILITY AS A PRINCIPLE IN THE PUBLIC SECTOR

Accountability is, according to the United Nations Development Programme (UNDP 1997: 4), a core characteristic of good governance. Traditionally it refers to the requirement for an agent

Sarbanes-Oxley, p. 15

[9] Review of National Human Resource Development Plan, Human Resource Development Council, 2009, http://www.hrdc.mu/index.php/downloads/category/13-nhrdp-2-2009, last viewed on 10 May 2017, Chapter 11.

to be accountable to the principle, which may be one or multiple stakeholders, for actions taken. In the political arena, accountability is derived from the responsibilities which ensue on individuals appointed to carry out functions on behalf of a people so that these individuals are required to explain and justify their actions to this people. This traditional notion of accountability is what distinguishes a democratic society from a tyrannical one.

However, accountability, as all ideas and principles, would be merely an airy notion without the appropriate framework. Such framework should provide a platform or at least a mechanism through which the agent is answerable for his or her actions, something through which questions can be asked and answers received. If an agent fails to respond to his assigned duties in the desired manner the accountability framework must also provide for enforcement.

Accordingly Messrs Rick Stapenhurst and Mitchell O'Brien are of the view that "the concept of accountability involves two distinct stages: answerability and enforcement"[10] and can be horizontal, vertical and even diagonal. In the public sector, public agencies and government departments become horizontally accountable to state institutions empowered to check abuses of other institutions or monitor them. Citizens, mass media and society in general would seek enforcement of standards of performance of government officials through vertical accountability. Independent officers or institutions, over which the government does not have coercive or authoritative powers, when reporting to parliament or a responsible minister would be doing so through a diagonal accountability.

To the two stages of accountability, one can surely insert monitoring as part of answerability. A way of ensuring confidence in government and responsiveness to the stakeholders being served is the evaluation of the ongoing effectiveness of public officials or public bodies. This confirms performance by the officials or bodies to their full potential with provision of value for money in relation to government funds which are expended for the public bodies.

Answerability

The parliament and the judiciary act as horizontal constitutional checks on the power of the

[10] Note written by Rick Stapenhurst (Senior Public Sector Management Specialist, World Bank Institute) and Mitchell O'Brien (Consultant, World Bank Institute), https://siteresources.worldbank.org/PUBLICSECTORANDGOVERNANCE/Resources/AccountabilityGovernance.pdf, last viewed on 31 August 2017

executive. Moreover, while parliament holds the executive politically accountable, the judiciary holds the executive legally accountable. These forms of accountability stem from the fact that parliament is a political institution, and the judiciary can only adjudicate on legal issues. Together, they keep the government accountable throughout its term in office.

In administrative accountability, which concerns mainly public servants rather than the elected government, there is no hierarchical relationship involved and, in principle, no formal powers to coerce officials into obedience. Thus administrative accountability, e.g. through ombudsmen, auditors, or independent inspectors reporting to parliament or a responsible minister, provides a form of independent administrative and financial oversight and control.

The aim of developing governance principles has been to encourage longer-term decision-making and more efficient use of resources. Governments are typically appointed with a limited timeframe, e.g. five years in Mauritius. Accordingly, politicians are always tempted to take short-term popular decisions likely to win electorates for forthcoming elections. Some politicians may also be tempted to abuse of their position to influence the allocation of public sector contracts and thus profit from short-term personal gains for themselves and their associates. The public sector becomes particularly vulnerable when the appointed Ministers are able to influence decision-making at different levels in the public sector. Accountability of public officials to the Government of the day as an institution versus accountability to individually elected politicians leads to a thorny exercise of balancing governance requisites. This is the more so as accountability to individuals can easily lead to unlimited political interference at all levels. The right balance must be struck between the need for accountability and the limits of the right to interfere.

By the Carltona principle[11], a minister need not personally exercise his powers unless the statute specifically requires and he can exercise his statutory powers through a civil servant so that in respect of such actions the minister and the civil servant are indivisible in law. This follows the classical doctrine that civil servants are subject to the direction and control of ministers and have no direct responsibility for their actions vis à vis the Parliament. The minister is accountable to the Parliament for all actions of the civil servants. The question is whether or not the Carltona principle would apply to other departments outside the core civil

[11] Carltona v Comr for Works [1943] 2 All ER 560.

service, e.g. for statutory bodies. As per the words of Dr O'Toole "it is Ministers and Ministers alone who answer to Parliament for the whole range of Government activity."[12]

Enforcement

For effective performance, consistent enforcement of accountability is essential. Questions that arise are whether such enforcement should be internal to the institution in question or external and whether it should rely on top-down or bottom-up mechanisms.

In effect, as stated earlier, parliament holds the executive politically accountable, the judiciary holds the executive legally accountable. The mechanism relied on in this case would be top-down. Accountability is therefore enforced through questions from members of parliament to Ministers and through adjudication procedures in courts. For proper enforcement there must be questions asked for exposure and hence transparency and a framework for protests, enquiry and exposure of facts through a judicial process whether through entry of civil or criminal cases.

The top-down framework finds its source in law which provides the mechanism to enforce political accountability. The general public can possibly also rely on law as an enforcement mechanism for accountability as anyone can enter a case in court. But law can have its limitations such as the lack of legal literacy, resource constraints, lengthy legal procedures. As a result it becomes easier for the average individual to simply overlook any public sector ineffectiveness. The process to seek enforcement can become more tedious than the consequences of the said ineffectiveness itself. Bottom up accountability would therefore find more room through media and public opinion which allows the public to hold the government accountable through their votes. The cases of the Air Mauritius and the Mauritius Institute of Directors ('MIOD') where the employment of the Chief Executive Officers were terminated due to divergence on corporate governance issues were brought to the public through the press. After eight months in service as Chief Executive Officer of Air Mauritius, Mr. Megh Pillay was sacked apparently because of a disagreement with the Chairman of the Board who was pressurizing him to annul disciplinary proceedings entered against an employee of the

[12] Select Committee on Public Service Report, UK House of Lords, January 1998, https://publications.parliament.uk/pa/ld199798/ldselect/ldpubsrv/055/psrep01.htm, last viewed on 7 December 2017, paras. 351 and 352.

company[13]. The Chief Executive of the MIOD was sacked by the Board for incompetence after sixteen months of service without a chance to explain[14]. However publicizing of such issues does not seem to have forced government into any positive action towards good governance. Responses to media scrutiny have been non-existent, contradictory and at best airy. In all probability the public will show its views by voting in the general elections or by voting with their feet via emigration.

ACCOUNTABILITY IN MAURITIUS

For further assessing of accountability in Mauritius, firstly the legal framework of statutory bodies has been examined generally and, secondly three statutory bodies have been taken as samples for aiding the analysis, a public enterprise that competes with private sector companies operating in the same sector (the National Transport Corporations, 'NTC'), an agency providing utility services to the country (the Central Electricity Board, 'CEB') and a regulator (the Financial Services Commission, 'FSC'). Thereafter the provisions of the law are compared with the provisions in the NCCG 2016.

The framework under Law, Vertical Accountability

It appears that the law in Mauritius has created a framework for statutory bodies to be accountable to Parliament through a minister who has also retained substantial powers of control. Under section 3 of the Statutory Bodies (Accounts and Audit) Act 1972 (as amended), the Board of a statutory body is bound to comply with directives by the Minister. Only two prerequisites must be satisfied. The directions must firstly be of a general character as to the performance of the Board's functions and secondly they must appear to the Minister to be 'requisite in the public interest'. The crucial questions are how often and in what manner does the Minister in question ensure that such prerequisites are fulfilled.

Under the same legislation, the Boards of statutory bodies are required to submit to the

[13]Sacked as CEO: Megh Pillay now resigns as Director of Air Mauritius, News on Sunday, 11 November 2016, http://defimedia.info/sacked-ceo-megh-pillay-now-resigns-director-air-mauritius, last viewed on 20 November 2017.

[14] Wehrli Adrien, Deux poids, deux mesures ou la bonne governance à la carte, Le Week End, 19 November 2017, p. 67.

Minister, annual report including financial statements, a 3-year strategic plan, estimates of income and estimates of expenditure in accordance with programme-based budgeting and financial statements on a yearly basis. The statutory body is also obliged to prepare such accounts as the Minister may require, and to provide him with means of verifying the information to his satisfaction. The Minister in turn has to lay the annual report to the Assembly at the earliest opportunity. Thus the chain of accountability is set for statutory bodies from the statutory board to the parliament. The accountability of the officers of the statutory body to report to the Minister is further enforced in the same statute in that if the chief executive officer or some other officer fails to abide by the requirements of the Act, the Board may take appropriate disciplinary action against such officers. However the Minister's accountability to set the annual report to the Assembly is not subject to enforcement since there is no definite time constraint. What happens if the Minister fails to lay the annual report for say two consecutive years and then lays all the accounts and reports in the third year?

Statutory boards in Mauritius appear to be typically accountable to Ministerial authority in that the parent Minister is the one who appoints the Chairperson and often approval of the Minister is required for appointments of officers and other staff. It is the same for several of the statutory bodies in Mauritius, including the National Transport Corporation, the Central Electricity Board or even the Financial Services Commission. Under section 28 of the Interpretation and General Clauses Act 1974, the power to appoint or to constitute any board or committee includes the power to remove, suspend, dismiss or revoke the appointment. With such power the Minister has definite authority and power of coercion over the officers he appoints and this reinforces the hierarchical accountability of the chairperson and officers of a statutory board to its parent Minister.

The Minister controls, to large extent, the functions of the statutory bodies through the power of appointment of members of the functional committees. An instance would be the Electricity Advisory Committee of the CEB, a committee which considers the matters affecting the distribution of electricity and the interests of electricity consumers. The Board is bound by law to consider representations made by this committee whose members are appointed by the Minister with their term and conditions of office also determined by the Minister.

In the case of the Financial Services Commission, the Minister has the power to appoint not only members of the Board but also the chairperson and members of the Review Panel on such

terms and conditions as he may determine. Other members of the Review Panel, established to review, if necessary, decisions of the Enforcement Committee, are the Solicitor General or his representative and the Financial Secretary or his representative, all of whom are either representatives of the government of the day or civil servants answerable to that government.

The Minister appears to also have the ability to influence the supervisory functions of the financial services regulator through its Financial Services Consultative Council. The independent decision-making of the Commission thus becomes questionable. The FSC has, among one of its objects to work out objectives, policies and priorities for the development of the financial services sector and global business and to make recommendations to the Minister with the function of advising the Minister generally on any matter relating to the financial services sector and to global business. The Financial Services Consultative Council is established under the Commission's parent legislation to act as a think-tank to suggest ideas for the development of the financial services and global business sectors. The Minister sits as chairperson of this council and the nine remaining members includes the chairperson and chief executive of the FSC and 6 more members all of whom are either designated or whose appointment is approved by the Minister. The Minister as chairperson of the council is probably to facilitate the functions of the FSC as adviser on matters concerning the financial services sector. However this set up may appear more like the Minister setting the grounds to ensure that advices sent to him are his own.

A Minister moreover has substantial power on the finances of statutory bodies under the purview of his Ministry. The three above-named statutory bodies illustrate this quite clearly.

For the NTC, approval of the Minister is required to raise funds through loans, issue of shares, or even the negotiation of overdraft facilities. The corporation cannot put a charge on any of its assets without approval of the Minister. Payments from the Reserve Fund established under statute may also be made only after approval of the Minister who also has the prerogative to alter annual estimated expenses and incomes, therefore strategies of the corporation, under section 19 of the National Transport Corporation Act 1979, which must be submitted for his approval.

Similarly for the CEB, the latter can raise funds through debts only with the approval of the Minister who also has the prerogative to amend and approve the annual estimates of income and expenses, including the annual estimates of capital expenditure, submitted for his approval.

In this case the annual estimates must be thereafter laid before the National Assembly. Financial investment decisions may be made by the CEB only with the permission of the Minister of Finance under section 13 of the CEB Act 1964.

Under the Financial Services Act 2007, the statute establishing the FSC, a Financial Services Fund is set up to promote financial services education and to meet expenses of the Review Panel. Disbursements from the fund are made only with authorization from a Management Committee whose members are also designated by, and are therefore nominees of, the Minister. This committee has to provide the Minister with such information that he may request, including a yearly report of its activities and audited accounts and is bound by law to comply with such directions as the Minister considers necessary in the public interest[15], directions which the statute however requires to be of a general character without any definition as to what would fall within the limits of generality.

The framework under the Law, Horizontal and Diagonal Accountability

Statutory bodies in Mauritius are subject to horizontal accountability to other bodies. For instance, the National Audit Office, a governmental department, is the de facto auditor of a number of statutory bodies in the country. These bodies also have to account to the Independent Commission against Corruption. The latter is empowered to enter any premises and search and take copy of documents if it believes it can find evidence to assist it in an investigation. Unless exempt by law, all statutory bodies are answerable to the Public Procurement Office for compliance with the laws of procurement in Mauritius.

There is also some diagonal administrative accountability in Mauritius. Statutory bodies usually have to abide by circulars and guides issued by the Ministry of Civil Service and Administrative Reforms and even horizontally to the Public Procurement Office on yearly estimated procurements. Statutory bodies are also subject to various compulsory operational requirements under law, e.g. they have to abide by rules of the Public Procurement Act for procurement matters. This can make business decisions more of a rule abiding game rather than a response to market demands, a serious handicap when a statutory body provides commercial services and competes with the private sector.

[15] Under section 69 (4)(b) of the Financial Services Act 2007.

Accountability framework and the Governance Codes

The NTC Act 1979 provides that the share capital of the corporation are subscribed by government[16]. Even in the case of the CEB, the government, as a typical shareholder, can inject advances out of funds voted by the National Assembly to enable the Board to carry out its powers, duties and functions[17]. The powers of the Minister to appoint and remove Board members also points towards the prerogatives of a shareholder so that it appears that the Board of a statutory body would be an agent of the government, including the Minister.

However the Minister, as seen above, has also wide powers of intervention in the functions of the statutory boards which are obliged not only to send yearly accounts to the Minister and the National Assembly but also to seek approval of the Minister for borrowing funds and even for investing funds. The powers of the Minister are limited by terms as airy as interventions of a 'general character' in relation to the Board's functions and as subjective as when it appears to the Minister to be 'requisite in the public interest'. The Minister appears to have the power of managing and leading the different departments of his/her Ministry and affiliated statutory corporations like the Managing Director of a large conglomerate. This is in sharp contrast to the section 2 of the Guidance Notes for State-Owned Enterprises which provides for the board of such enterprises to **'**be empowered to function in full operational autonomy'. It is doubtful that the provisions of these Guidance Notes would override statutory provisions.

On the other hand, it should also be noted that Ministers are elected representatives of the people chosen to implement policies and, at least in theory, they are usually elected based on the policies they propose to the people. The public sector departments and agencies are to help them develop and implement such policies. However the doubtful capacity of Ministers of diverse backgrounds to manage seasoned professionals undoubtedly leads to a desirable autonomy in operations if not in policies. However it is not the subject of this paper to assess capacities of Ministers. Some may well have abilities enough to compete with any business person.

The NCCG 2016 requires a statutory body to have at least 2 directors independent of the parent Ministry. The expected role of an independent director, in contrast to other directors, is not

[16] Section 10 of the National Transport Corporation Act 1979.
[17] Section 12 (1) (b) of the Central Electricity Board Act 1964.

defined in NCCG 2016. It is however provided that such a director would be independent of the parent ministry. It is commonly expected that an independent director is able to exercise sound and independent judgment and decision-making and bring 'an independent viewpoint to the deliberations of the board'. Should we assume that the appointment letter of the independent director provides that he or she is independent and has such responsibilities despite the fact that all the directors of a statutory body are nominees of a Ministry? In a framework where the Minister can give directions to the Board, expecting independence is but wishful thinking.

CONCLUSION AND RECOMMENDATIONS

While traditional principles in the Mauritian public sector were stability and continuity, with the NCCG 2003, 2016 and the Guidance Notes for State-Owned Enterprises in 2006, corporate governance principles are applicable to state-owned enterprises and parastatal bodies in Mauritius. It is found that the governance codes of Mauritius are very procedure-centred and the procedures detailed in NCCG 2016 are mandatory to public-interest entities, including public sector organisations. The mandatory minimum standards of practice may help to develop accountability in public interest entities.

The accountability of public officials to individual Ministers versus to the government as an institution working in the interests of the country can give rise to governance issues.

However the legal framework of statutory bodies points towards the accountability of the statutory boards and officers to the parent Ministers who appear to have wide powers of intervention so that the operational autonomy of boards and the independence of directors is very much of a myth. It appears that the Carltona principle that the Minister acts through his public officials would extend to Mauritian statutory bodies.

From the wide powers attributed under statutes to parent Ministers and considering that statutory bodies have to abide by circulars and guidelines issued by different Ministerial departments, the operational independence of statutory boards is more of an ideological mirage. Should a statutory body aim at having a board operationally independent from its parent Ministry, a possible solution would be that the parent Ministry itself should limit its

interventions through a document issued to directors who are appointed. Such document could be in the form of a shareholder's agreement or could simply be a contract between the Ministry and the director appointed including the letter of appointment and conditions of appointment, but also the outcomes expected of the director at the term of appointment and the limits of intervention of public officials and the parent Minister in the affairs of the board and the statutory body. From such outcomes, which would reasonably reflect policies of the government, directors, and consequently the board, can devise strategies and performance requirements for management to deliver. This would provide the right compromise between the Minister's role in policy making, ensuring implementation and monitoring and the operational autonomy of statutory boards. The legal obligations imposed on statutory bodies need to be reworked to ensure clear accountability. Otherwise, currently, the management of statutory bodies are accountable to their parent Ministry, to several other Ministries and departments and finally report on all these accountabilities to their boards which appear to act a little better than a sounding board.

The need for a clear mandate for the board along with the need for a clear distinction between the role of the board and the ownership function of Government is also highlighted in OECD's report of 2018, "Professionalising Boards of Directors of State-Owned Enterprises: Stocktaking of National Practices", which also provides for professionalizing board nomination frameworks by, e.g., making use of external recruitment consultants and disclosing appointment procedures. Such disclosure may be to the Cabinet or, why not, to Parliament.

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