

# Human Rights Protection of Detainees and Victims? Is Mauritius Falling Behind?

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## ABSTRACT

**Objective** – This paper examines the issue of human rights protection for detainees and victims in Mauritius and analyzes whether the country is falling behind in this area.

**Conclusion** – There are significant gaps in human rights protection for detainees and victims in Mauritius, which need to be addressed by the government and civil society. The UK's human rights mechanisms can play a crucial role in promoting and protecting human rights in Mauritius.

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## I. INTRODUCTION

The Mauritian has a hybrid penal system derived partly from French civil and British common law. Mauritius's constitution, the Supreme Law of the land, is used to safeguard Human Rights and prevent any misuse or breach of powers. Similarly, the UK takes recourse from the Human Rights Act to protect detainees and victims. The UK has a parliamentary system of governance, with the Westminster Parliament being the Supreme law-making body. The doctrine of supremacy of parliament refers to the fact that Courts accept legislation enacted by parliament takes precedence over the common law, especially the judge-made law as developed through cases.

Under Mauritian law, an arrest occurs when a police officer states that he is arresting or when he uses force to restrain the individual from moving anywhere beyond the arrestor's control, Section 9 (3) of the District and Intermediate Courts (Criminal Jurisdiction) Act provides that some actual touching or confining of the body shall make an arrest. A police officer has the power to arrest a person suspected of having committed an offence. The officer will arrest the person pursuant to an arrest warrant. Similarly, a person is detained in the UK under reasonable grounds where he can be involved in a crime, and the powers are vested in the police.

### Rights of Detainees

According to the United Nations Human Rights, "detained person" means any person that has been deprived of his personal liberty except as a result of a conviction for an offence.

### **Analysis on the Mauritian Perspective of the Rights of Detainees**

In Mauritius, the constitutional rights of detainees have been elaborated in Section 5 (2) to (4) of the constitution of Mauritius. According to Section 5 (5), any person who any other person unlawfully arrests shall be entitled to compensation from the other person. The writ of habeas corpus is intended to be a procedure to secure the release, as a matter of urgency, of a person who is unlawfully detained. In *Kistoo v. Commissioner of Prisons* (1967), the court considered habeas corpus “a safeguard for the subject against illegal detention.” Furthermore, by virtue of Section 10 of the Constitution, every person charged with a criminal offence is recognised with numerous rights.

### **The Right to Fair Hearing**

This right is related to any person who is charged with a criminal offence; an independent and impartial court must allocate him a reasonable time. For example, if a person is arrested in 2010 and tried by the court in 2030 or if the Magistrate or Judge is related to the detained person with whom he has bad blood ties.

Once arrested, it is deemed judicious that the suspect must be given the right to hear his case an ample time. This is so because the more delay it takes to deal with his case, the more prejudice it can cause to the suspect and his family. They have to bear heavy toil such as suspension at work, worsened reputation in society, and he is not allowed to travel freely outside Mauritius. However, if an accused finds that there has been a huge delay from the date of his arrest till the date on which his case has been lodged before the court, he can make a motion in court to stay proceedings on the grounds of abuse of process. This is solely to stop the case as the prosecution has abused the criminal process, and he has been prejudiced highly.

In the case of *Mungroo v. Queen* (1991), the appellant complained that he had a serious criminal charge hanging over his head for four years and was deprived of his right to a fair trial within a reasonable time. The Judicial Committee of the

The Privy Council observed that the right to a fair trial “within a reasonable time,” as provided by section 10 (1) of the constitution, highlights that first, the accused is not prejudiced in his defence by delay. Secondly, the period during which an innocent person is under suspicion and any accused suffers from uncertainty and anxiety is kept to a minimum.

### **Presumption of Innocence**

Additionally, a person charged with a criminal offence shall be presumed innocent until he is proved or pleaded guilty. He is considered to be guilty if only the court declared him so. Moreover, the presumption of innocence is integral to our criminal law system. The duty of the prosecutor is to prove you are guilty. Hence, this presumption shifts the burden of proof onto the prosecution to prove that the accused has committed a criminal offence.

### **Informed of the Charge**

It is also imperative for a person to be informed as soon as reasonably practicable, in a language that he understands and, in detail, about the nature of the offence he is charged with. It is the right of the detainee to know the reason behind his arrest, and he must be given a detailed explanation of the charge. This is important in helping him to prepare his defence.

### **Preparation of Defence and Access to Interpreter**

A detainee must be given sufficient time and facilities to aid him in the preparation of his defence. Additionally, he must be allowed to contact his defence counsel since he is presumed innocent until proven guilty. Even when the case has been lodged in court, the court should ensure that the accused has sufficient time to prepare his case. In the case of *François v. R* (1975), the accused was allocated eight days to prepare

his defence and retain services of counsel while he was in jail, and the trial court refused the counsel's request for postponement. It is to be noted that it was held on appeal that the refusal of the postponement amounted to a denial of the appellant's constitutional rights – the time granted to the appellant to prepare his case and retain counsel was unusually short. Additionally, a detainee is allowed without any payment to be effected to have recourse to the assistance of an interpreter if he cannot understand the language used in court.

### **Right to Defend Himself**

According to section 10 (2)(d) of the Constitution, it has been clearly stated that every person who is charged with a criminal offence shall be allowed to defend himself in person or, at his own expense, by a legal representative of his own choice or, where so prescribed, by a legal representative provided at the public expense.

1. Defend himself in person.

A detainee has the right to defend his case on his own without retaining any counsel services. However, under serious circumstances, courts normally inform the accused that if he wishes, he can retain counsel's services, but nothing should be imposed on him. He is attributed with the right to make his own decision.

2. Choosing his own defence counsel.

A detainee has the right to choose his own counsel. However, whilst it is an accused's constitutional right to be represented by counsel of his own choice, it is his duty to secure the attendance of counsel in court on trial day. That is why the case is called to court; it is not for trial to be started but is a pro forma date. Therefore, he should be given ample time to look for his counsel and obtain dates from counsel for the case trial. In the case of *Lallchand v. R* (1975), the case was called for pro forma, and there was a letter from counsel suggesting dates for trial, but the Magistrate nevertheless proceeded to hear the case in the absence of counsel and convicted the accused, it was held on appeal that by trying the case in the absence of counsel the Magistrate had deprived the accused of his constitutional rights.

3. Legal Aid.

In Mauritius, the Legal Aid and Legal Assistance Act 1973 provides legal aid and legal assistance free of charge to needy persons. In addition, the Act provides for a lawyer to be appointed at public expense where the conditions laid down in the Act are satisfied. Initially, the Act provided only legal aid, but in 2012, the Act was amended to include legal assistance. The motive established behind this reform is to enable the Government to promote access to justice for the common man, the less fortunate, the needy, and the deserving people. Although, at first, the Act provided defence counsel to accused parties who were needy to fight their cases in court, now the Act enables them legal assistance even during police inquiry and for bail application for offences.

Hence, a detainee can cross-examine prosecution witnesses or examine witnesses called to testify on his behalf. However, in circumstances where a detainee is not represented in court by a defence counsel, the court must remind the accused to cross-examine prosecution witnesses or present witnesses in his defence. After the judgment has been delivered, an accused or his representative can obtain a copy of the court proceedings.

### **Right to Remain Silent**

Moreover, once a person has been detained for inquiry and even in court, it is to be noted that he is entitled to a right to remain silent. During that phase, he cannot be forced to give evidence. This right is founded on the constitutional presumption of innocence. The burden of proof is completely on the prosecution and not the detainee to bring any evidence forward. However, very few are aware of this right

in Mauritius, and some unaware of their constitutional rights, tend to confess on the spot because of the fear of being arrested. Hence, it is the duty of the police to warn the detainee of his right to remain silent. Even in court, while the prosecution is submitting evidence against the accused, he is reminded of his right by the court to either remain silent or present his defence. The Supreme Court held that in the case of *Abdullah v. R* (1980), a trial court is not allowed to draw any adverse conclusion against a detainee because, when identified on parade, he resorted to silence, which he was perfectly allowed to do. However, in the case of *Fullee v. R* (1992), the court observed that the Constitution, no doubt, provides the sacred right to remain silent, but the Constitution does not prevent courts from drawing in appropriate cases, certain interferences from an accused's silence when the circumstances are crucial enough where an explanation is needed from him.

### **No Retrospective Legislation Applied during Trial**

This emphasizes that no person shall be held guilty of a criminal offence that did not, at the time it took place, constitute such an offence. For example, Before the Public Health Act 2010 was in force, it was allowed to smoke in public. Therefore, if a person was smoking in a public place in 2008, he cannot be prosecuted for this offence as this offence was not existent.

### **UK Perspective of the Rights of Detainees**

The rights of the detainees are similar to that of the Mauritian Constitution, with only minor changes. UK makes avail of the Human Rights Act passed in 1998 to let an individual defend his rights in UK courts and compels public organisations to treat everyone equally with fairness, dignity, and respect.

### **Prisoners Abroad**

Since 1978, the charity Prisoners Abroad has extended its support and advice to British citizens detained overseas. This is available to all, whether guilty or innocent. This also emphasizes health and welfare during imprisonment and till the return to the UK. Furthermore, they extend their support in myriad ways and protect their rights. For example, detainees are allowed to work and study simultaneously in prisons and have recourse to different courses.

### **Immigration Detention**

This refers to the action of holding someone in official custody before they are deported from the UK, and the immigration officers decide this. In the UK, there is no time limit on how long an adult can be detained, this could be undetermined except for pregnant women. However, according to UK Government's (n.d.) policy on detention is to be used for a short period. Hence, if the detention exceeds a certain time gap, the detention will be unlawful for being incompatible with the law. Individuals can be detained at any time and are not entitled to stay in the UK without valid permission. However, this does not apply to certain groups of people. Unaccompanied persons under 18 and adults who may be "particularly vulnerable to harm in detention," as mentioned in the Home Office 2016, such as people aged 70 or over, pregnant women, and those with physical disabilities, among other cases.

Nevertheless, they can be released by applying for an immigration bail per paragraph 1 of the Immigration Act 2016. Nevertheless, the Secretary of the State may grant an immigration bail irrespective of whether the person has applied for it or not if he deems it appropriate for everyone. Additionally, the power for First-tier Tribunal to grant immigration bail is vested in paragraph 1(3) of Schedule 10 of the Immigration Act 2016. Tribunal bail is available for detainees for release if they have been in the UK for 8 days or more. Before granting bail, emphasis is laid on considering various factors such as the likelihood of the person committing the offence and its impact on society if ever he risks putting the lives of the public in danger. Now, once the bail is granted, the detainee has to abide by certain conditions such as appearance

date, residence condition, electronic monitoring any other condition that the judge deems suitable. Moreover, the decision to detain a person can be challenged through a judicial review. If they prove the arrest was unlawful, they may be entitled to receive compensation, apologies, and other forms of reimbursement.

## II. ANALYSIS

An in-depth analysis sheds light on the fact that the rights of the detainees in Mauritius and the UK are almost the same kind of the rights they are entitled to. However, in Mauritius, the right of a detained person to remain silent is not provided clearly in the Mauritian Constitution. The Supreme Court has interpreted the accused's right not to be compelled to testify at his trial and the Judges' rules that read the right of a detained person to remain silent into the Constitution. *State v Coowar Mamode Aniff* was the first case where the Supreme Court had to deal directly with the issues of whether there are circumstances in which evidence obtained through human rights violations may be admitted. The accused was not informed of his right to counsel upon his arrest.

This was seen as a breach of the Judges' Rules, and this should be differentiated from a breach of fundamental rights. Evidence gathered through a violation of Judges' Rules may be accepted, but the same is forbidden when dealing with a 'breach of fundamental rights.' To support this statement, reference was made to the case of *The Queen v M. Boyjoo and R.D Boyjoo* that "violations of fundamental rights under the Constitution should not be looked upon with levity... To that extent, the English approach to breaches of the Judges' Rules."

Additionally, in the case of *Geneviève Alain Steeve v. The State*, the accused's rights to counsel had been violated by the police. However, in *State v E. Madelon*, the Supreme Court changed its verdict on that issue since it was the police, contrary to the Judges' Rules, had not sufficiently informed the accused of the offence charged against him before questioning him. The court stated that the Judges' Rules are not rules of law but guide police officers in conducting investigations. This has been interpreted by England court in this was referred to in the case of

*In the State v Bundhun (2006) SCJ 254 at 9-10, the Supreme Court observed that 'The Judges Rules in their present form were...made by the Judges in England for the guidance of police officers conducting investigations. They were formulated by a Committee of Judges and approved by a meeting of all the Queen's Bench Judges. They were made applicable to Mauritius in March 1965, as indicated in a letter dated 12 March 1965 written by Tom Vickers, Chief Secretary, on behalf of the Governor of Mauritius, and addressed to the Commissioner of Police.*

As such, the difference between the UK and Mauritius is that in England, detainees have full right to silence, and no adverse assumptions are to be derived from it, and neither are they forced to.

Similarly, in Mauritius, Detainees do not have a full right to silence since, looking at the gravity of the incident, they are forced to answer in that circumstance.

It is to be noted that Mauritians who are arrested abroad are entitled to a right to remain silent and the right to counsel, which is not clearly stated in the Constitution but found in the case law. Although, moreover, light has been shed on the fact that Mauritius signed an agreement with India on Mutual Legal Assistance in criminal matters, this agreement is considered to be silent on the protocols to be followed by Indian officials to extract evidence from Mauritian people arrested in India to be prosecuted in Mauritius. This ensures correct measures are undertaken to dwindle the threats of rejecting the evidence by Mauritian Courts. Additionally, if a British Citizen is arrested and detained in Mauritius, the Mauritian authorities should inform the British High Commission upon the prisoner's formal request. Similarly, there is a



Prisoner Transfer Agreement between Mauritius and UK. This enables them to continue serving their sentence in their own country.

### **Rights of Victims**

“Victims” refers to persons who have suffered harm, including physical or mental injury, emotional suffering, economic loss, or violation of their fundamental rights.

### **Analysis on the Mauritian Perspective of the Rights of Victims**

The rights of victims are varied among various fields. A person can become a victim in different ways; this is a prevalent situation in the modern context. Be it in the employment force, in society, and in almost different sectors where they have been deprived of their fundamental human rights, such as abuse by police officers, arbitrary arrests, corruption in government, harassment of media, inhuman treatment, lack of accountability in cases such as domestic violence and gender discrimination. Section 3 of the Constitution is highly important since it deals with the fundamental rights and freedoms of the individual, and it deters any type of prejudice being inflicted on any individual. Hence safeguarding their rights. As such, the Constitution plays a vital role in preserving the victims from abuse in their rights.

Hence, as per “*Section 28 (1) (b)(ii) of the Constitution: There shall be a President who shall uphold and defend the Constitution and ensure that the fundamental rights of all are respected.*”

Furthermore, Section 17 provides enforcement of protective measures to safeguard any individual’s rights. This has been provided as follows: “*17(1). Where any person alleges that any of Sections 3 to 16 has been, is being likely to be contravened in relation to him, then without prejudice to any other action with respect to the same matter that is lawfully available that person may apply to the Supreme Court for redress.*”

Furthermore, Section 17 (2) lays emphasis on that the supreme court shall have an original jurisdiction to hear and determine the application and take appropriate measure to rectify the situation.

### **Victims of Rape and Domestic violence**

Domestic violence, which was seen as a ‘private matter,’ is now viewed as one of the major Human Rights issues. Violence against women and girls continues to be rampant globally, killing and torturing the victims physically, psychologically, sexually, and economically (Heise, Raikes, 1993). Consequently, in Mauritius, the issue has escalated, especially during the Covid-19 pandemic, in the second phase of the crisis in March 2021. The law strictly deters rape and domestic violence cases, but there is no provision to criminalize spousal rape unless it is sodomy. The penalty rape is up to 20 years of imprisonment, with a fine not exceeding 200,000 rupees (\$5,555). Therefore, in Mauritius, rape cases are less likely to be in the headlines unless they are horrifying. Additionally, per the Protection from Domestic Violence Act, a victim can avail of the protection order.

### **Victims of Unlawful Arrest**

In the case of *Dauhoo v. State & Commissioner of Police (2007)*, the Supreme Court observed that an arrest might be unlawful, even if the arrest was within the powers of the police if there has been an improper exercise of such powers. This becomes in line with Section 5 of the Constitution, whereby it has been clearly mentioned that arresting someone is the same as depriving him of his liberty by virtue of one of the exceptions provided. Hence, to avoid any human rights violation, the one detaining the person should ensure that everything is being followed according to the decorum of the Constitution.

### **Victims of Child Abuse**

Section 6 of our Constitution lays emphasis on the laws relating to employment in Mauritius. This act provides that any child under 16 is prohibited from working and entering into any contract, and the employers are to ensure they do not employ any young individuals, especially if the working conditions can endanger their life. In addition, the ombudsman for children has been set up to protect children from abuse.

### **Victims of Police Brutality**

It is not hidden from any Mauritian that many have lost trust in the police force due to the atrocities of some that the country has witnessed. In 2020, a robbery suspect accused that he was subjected to different tortures. Similarly, in 2018, a man accused of theft reported that he was chained, handcuffed, and tortured him using tasers, and he died in 2020. Additionally, shocking videos of alleged police brutality have been viral on social media, especially during the Covid-19 pandemic.

### **Rights of Victims in the UK**

On 1st April 2021, in the press release by the Ministry of Justice in the UK, there were certain reforms that were made in regard to the victims in the UK; a new version of the Victims' Code was introduced in England and Wales. This was mainly done to better assist the victims with better assistance from the police, courts, and other criminal justice agencies. In addition, however, much emphasis was laid on the following:

1. Victims receive automatic updates when their wrongdoers leave jail. This will be considered as their automatic right to be informed.
2. Victims of rape and sexual violence can choose the gender of the police interviewer. This will facilitate the interview process by making them feel at ease to convey relevant details. They will also be able to get sufficient advice on when they can have their evidence pre-recorded ahead of a trial. This will prevent them from confronting the stress of cross-examination in front of a courtroom. However, if the offender is a foreigner, victims shall be informed when they are deported.

Creates a way for consultation on victims' law. This was implemented to underpins victim's rights in legislation and ensure justice agencies are held accountable for delivering them. The Lord Chancellor, Robert Buckland QC MP, said *"Having worked for 25 years as a criminal barrister, I know how daunting the justice system can be for victims, which is why the information and support they receive is so vital"*

Furthermore, the Code englobes twelve principal rights that are direct, concise, and easy to understand. Those include the right to be kept informed, the right to make a victim's personal statement, and the right to access support services. Victims also have the right to receive information about the investigation and prosecution of the crime, as well as the case's outcome.

Other rights include the right to protection, the right to be treated with dignity and respect, the right to participate in the criminal justice process, and the right to access compensation. Victims also have the right to request special measures in court, such as giving evidence behind a screen or via video link, and the right to have their views considered in parole hearings.

Finally, the Victim Code highlights the right to be referred to appropriate support services, such as counseling or therapy, and the right to seek information on the offender's release from prison. This provides them with the level of information and services that they should be entitled to.

They will also be eligible automatically for the Victim Contact Scheme (VCS) and offered Victim Liaison Officer (VLO), which will help them access important updates. A VLO can aid the victims in applying for licence conditions to reduce the chance of them meeting an offender in the community and assist with requesting reviews of Parole Board decisions. Victims will be entitled to a Victim Personal Statement (VPS) in which the crime details of how it affected the victims will be elaborated, and they can

request a copy of it in the future. They have the right to be informed of the reason if a suspect is not prosecuted or appeal to the Crown Prosecution Service to review the decision.

The Victim's Commissioner for England and Wales, Dame Vera Baird QC, asserts that: *"Under the Victims' Code, everyone has a right to support following a crime. The victim's code lays emphasis on the services and information victims are entitled to and the rights elaborated sets out clarity for victims."*

Additionally, for victims of abuse and harassment by a named person, or to prevent them from living in one home, a victim has the right to apply for an order on a non-molestation or occupation order (FL401). This is usually in cases of domestic violence, especially where the victim's life is in danger, or her child takes recourse to this order to protect them. Moreover, an occupation order is issued where the court decides who should stay in that home or any part of it. This is a free service offered, and the victims can choose any of the options depending on their situation. A supporting witness statement is to be filled, and to assist them, they can make avail of the template designed for them.

### Analysis

In the broadest sense, it is nearly impossible to protect each and every individual from becoming a victim since this can arise at any place and time. Moreover, the types of victims highlighted are only part of it that we are aware of. Hence, to help them, Section 75 of the Constitution establishes that if a person has been wrongly treated as a victim, he is entitled to restitution, compensation, and rehabilitation. The court must analyse the gravity of the issue and act accordingly. Those reparations are to be paid directly from the Trust Fund established under Article 79.

Moreover, the ombudsman is entrusted with the duty to investigate any allegations of unfair actions before taking any decision. The Ministry of Gender Equality Child Development and Family Welfare's Child Development Unit assists and aids children from any abuses extending their support to the child. While in the UK, there is a Victim Strategy. In England, Wales, and Scotland, the Victims' Code supports the victims of crime, while in Northern Ireland, the Victim Charter sets out important guidelines on how the victims are to be assisted. In the UK, victims of sexual violence are supported by Sexual Assault Referral Centres (SARCS) and voluntary sector Organisations (Robinson & Hudson, 2011).

Hence, it is evident that no matter what, being a victim can occur in different instances, and as a reform, Mauritius can try to implement the Victim Contact Scheme; this will help victims to be posted on important updates and support and they not feel lost as well. Similarly, the GPS tracking bracelet is available in the USA, which helps the detainees who are granted bail to enjoy their life and be in contact with the police.

### III. CONCLUSION

On a concluding note, viewed in retrospect, there are not many differences in terms of the rights of the detainees since Mauritius follows the common law, and due to this, the Constitution of Mauritius and the Human Rights principles adopted by the UK are almost the same. The only difference is the UK is much ahead of Mauritius in terms of implementation of effective laws, and also, since Mauritius follows the English common law, most of the interpretation of certain legal remedies are derived from it.

Similarly, the Constitution tries its best to protect the victims but fails to cater to all. Hence, new reforms should be explored while making the laws stricter. Additionally, along with the evolution of time, some laws have become obsolete, and new and modernised reforms are needed for the betterment of society as well. Finally, the rights of detainees and victims are not that sufficiently protected in Mauritius; despite this, some issues need to be tackled.



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